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VOLUME 17 AUTUMN 1949 NUMBER 1

CONTENTS

THE UNITED STATES SUPREME COURT: 1948–49 1
By John P. Frank

BASEBALL—SPORT OR COMMERCE? 56
By John Eckler

MY TRIAL AS A WAR CRIMINAL 79
By Leo Szilard

NOTES

Construction of Intent in Limitations to Grantor's Heirs 87

Constitutionality of State Equalization of Property Assessments in Illinois 93

Voting Trusts under the Illinois Business Corporation Act 103

An American Legal Dilemma—Proof of Discrimination 107

Determination of Just Compensation in a Controlled Market 125

Migratory Divorce in Australia and the United States 134

Guilt by Association—Three Words in Search of a Meaning 148

Post-Kinsey: Voluntary Sex Relations as Criminal Offenses 162

RECENT CASES

Copyright Pooling and the Anti-trust Laws. *Alden-Rochelle, Inc. v. American Society of Composers, Authors and Publishers*, 80 F. Supp. 888 (N.Y., 1948) 183

Rights of Unregistered Shareholders. *Rosenthal v. Burry Biscuit Corporation*, 60 A. 2d 106 (Del. Ch., 1948) 194

Right of Minor Child To Sue Parents for Support. *Parker v. Parker*, 335 Ill. App. 293, 81 N.E. 2d 745 (1948) 200

Inter-count Reference on Motion To Dismiss under the Illinois Practice Act. *Fred C. Kramer Company Inc. v. Hebard Storage Warehouses, Inc.*, 336 Ill. App. 150, 82 N.E. 2d 832 (1948) 207

Prescriptive Easements in Illinois. *Poulos v. F. H. Hill Co.*, 401 Ill. 204, 81 N.E. 2d 854 (1948) 210

BOOK REVIEWS

Machlup, The Basing-point System 218
By Ward S. Bowman

Gregory and Katz, Labor Law: Cases, Materials and Comments 228
By Harry Shulman

BOOKS RECEIVED 231

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THE
UNIVERSITY OF CHICAGO LAW REVIEW

VOLUME 17 AUTUMN 1949 NUMBER 1

THE UNITED STATES SUPREME COURT: 1948-49*

JOHN P. FRANK†

IF Supreme Court Justices ever wish they had a more interesting way to make a living, then the thought must have occurred to them frequently during the October, 1948 term; for as terms go, it was rather dull. If a social, an economic, and a political historian were each to write a volume on America in the decade of the 1940's, it is highly possible that, without being careless draftsmen, none of them would include any reference to the work of the Supreme Court at the 1948 term. The sole event certain to be chronicled is the tragic death of Justice Murphy shortly after the close of the term. Termination of his judicial work is of considerably more importance in the history of the Supreme Court as an institution than any other event of the year.‡

I. HIGH SPOTS OF THE YEAR

The year's excitement, by no means intense, was concentrated in the area of labor relations, which provided one-sixth of the year's cases. Perhaps the most important development of the year was labor's discovery that the Constitution would not save it from restrictive legislation. However, this could have been a surprise only to those labor lawyers who had read the decisions of recent years with blind optimism.

Of the five cases of greatest importance, three concerned labor: *Giboney v. Empire Storage & Ice Co.*,[1] *Lincoln Federal Labor Union v. Northwestern*

* This article purports to be as much a social survey as a legal analysis of the work of the Supreme Court at the last term. It is the third in a contemplated annual series and is written in part for the legal, social, and economic historians of the future who may find it useful to have a contemporary view of the last term's work. The preceding articles on the 1946 term, 15 Univ. Chi. L. Rev. 1 (1947), and the 1947 term, 16 Univ. Chi. L. Rev. 1 (1948), will hereafter be cited as 1946 Term Article and 1947 Term Article.

† Associate Professor of Law, Yale University.

‡ The death of Justice Rutledge occurred after this article went to press.

[1] 336 U.S. 490 (1949).

Iron & Metal Co.,[2] and *International Union, UAW v. WERB.*[3] The unanimous decision in the *Giboney* case upheld restrictions on peaceful picketing; the *Lincoln Federal* case upheld a Nebraska anti-closed-shop statute. While both have a quality of inevitability, the *Giboney* case in particular begins a major new chapter in the constitutional law of labor relations. It opens wide for discussion the question of how far governments may go in restraining picketing. However, in terms of immediate results the *UAW* decision, involving the extent to which the right to strike is protected by the Wagner and Taft-Hartley Acts, has proved the most important case of the year; for already three states have found in it an apparently unlimited right to forbid strikes.

The other two cases of most significance are *Wolf v. Colorado*[4] and *Terminiello v. Chicago*.[5] The *Wolf* case called for the first determination by the Court of the extent to which the states are limited by the 14th Amendment in making unreasonable searches and seizures. The Court in effect compromised on the issue, holding that the states are forbidden as a matter of due process from permitting unreasonable searches and seizures, but that evidence thus obtained would be admissible. In the *Terminiello* case, an unfrocked priest sponsored by Gerald L. K. Smith made some nasty observations in a Chicago auditorium to a group of adherents. The place was surrounded by a hostile crowd. The speaker was convicted of disorderly conduct, essentially for having incited the mobs within and without. In setting aside his conviction, the Court was faced with the vital problem: Under what circumstances, if any, may speech be suppressed because it incites those who hear to lawless acts against the speaker and his adherents?

II. Regulation of Labor and Business

Labor

Had the general counsels of the two major labor federations sent brief memoranda to their executive committees at the close of the 1948 term of the Supreme Court, those memoranda could well have read something like this:

> To the Executive Committee of the AFL (or CIO):
>
> It is now apparent that organized labor cannot rely upon the federal courts to set aside the restrictive labor legislation of recent years. If we are to escape hostile legislation hereafter, we must rely even more heavily than before upon political rather than legal action.

[2] 335 U.S. 525 (1949). A related case was AFL v. American Sash & Door Co., 335 U.S. 538 (1949).

[3] 336 U.S. 245 (1949). [4] 69 S. Ct. 1359 (1949). [5] 69 S. Ct. 894 (1949).

This is the lesson of the *Lincoln Federal* and *Giboney* cases, for they involved fundamental decisions in constitutional law. But there were many minor labor cases as well.[6] National Labor Relations Board orders were reviewed in three instances. The only case of any novelty held that an employer-owner of a company town could not discriminate against unions by refusing permission to use the company's meeting hall, the only in the town.[7]

The more important cases interpreting the Wagner and Taft-Hartley Acts involved the jurisdictional relationship of state and national labor boards. Three cases arising from orders of the Wisconsin Board, all involving industries in interstate commerce, produced these results: (1) A state board could not determine the appropriate bargaining unit in an interstate telephone company and certify a representative, even though the national board had not acted. Since the two boards might give directly conflicting orders, the situation was "too fraught with potential conflict to permit intrusion of the state agency."[8] (2) A state board could penalize an employer who enforced a closed-shop agreement which was contrary to state law, since such action under state authority did not conflict with the Wagner or Taft-Hartley Acts.[9] (3) A state board could declare as an unfair labor practice a series of sporadic work stoppages intended to coerce an employer, but which did not amount to a conventional strike. The latter case, *International Union, UAW v. WERB*,[10] is of such striking importance that it will be discussed at length below.

The *Lincoln Federal* case, one of the two cases categorized above as of outstanding importance to labor, also involved a state statute forbidding

[6] Vermilya-Brown Co. v. Connell, 335 U.S. 3777 (1949), held the Fair Labor Standards Act applicable to workers employed under federal government contracts on a lend-lease base in Bermuda. But Foley Bros. v. Filardo, 336 U.S. 281 (1949), held the Federal Eight Hour Law inapplicable to United States citizens employed in Iran. Urie v. Thompson, 69 S. Ct. 1018 (1949), held that both the FELA and the Federal Boiler Inspection Act covered occupational diseases.

[7] NLRB v. Stowe Spinning Co., 336 U.S. 226 (1949). The other two Board cases were NLRB v. Crompton-Highland Mills, Inc., 69 S. Ct. 960 (1949), holding that an employer who by-passed collective bargaining negotiations then in progress to give a wage increase without reference to the negotiators had committed an unfair labor practice; and NLRB v. Pittsburgh Steamship Co., 69 S. Ct. 1283 (1949), considering alleged bias of a trial examiner.

[8] LaCrosse Telephone Co. v. WERB, 336 U.S. 18 (1949). The case called for and received routine application of Bethlehem Steel Co. v. N.Y. State Lab. Rel. Bd., 330 U.S. 767 (1947). On the general subject of the relation of state and national labor laws see State Labor Laws in the National Field, 61 Harv. L. Rev. 840 (1948). There are numerous industries over which the NLRB does not normally take jurisdiction, with an estimated labor force in 1940 of thirteen million workers. Killingsworth, State Labor Relations Acts 3 (1948).

[9] Algoma Plywood Co. v. WERB, 336 U.S. 301 (1949).

[10] 336 U.S. 245 (1949).

the closed shop. With the decline and fall of the New Deal, the states began to pass restrictive labor legislation which served as a forerunner for the Taft-Hartley Act. Statutes of North Carolina and Nebraska forbade both the yellow-dog contract and the closed shop, by making it illegal for an employer to discharge his employees because they were or were not union members. In the *Lincoln Federal* case, the Court, speaking through Justice Black, held these statutes valid.[11]

This closed-shop case had elements in common with the picketing case, *Giboney v. Empire Storage & Ice Co.*,[12] which involved the picketing of an ice company by independent door-to-door peddlers in Kansas City, Missouri. About 80 per cent of the ice peddlers were in a union, and as part of an organizing campaign, they determined to picket those ice companies which sold to nonunion handlers. Empire obtained an injunction in a Missouri state court against the pickets. On appeal the Missouri Supreme Court, upholding the injunction, reasoned that if Empire refused to sell ice to nonunion handlers, it would violate the state restraint-of-trade statute and thus commit a crime. The United States Supreme Court affirmed in a unanimous opinion by Justice Black. In both the *Giboney* and *Lincoln Federal* cases the underlying labor arguments claimed denial of freedom of speech, press and assembly, due process, equal protection, and perhaps freedom from involuntary servitude.

As an attempt to invalidate the anti-closed-shop statute, these arguments are unsubstantial. It is almost impossible to comprehend just how the freedoms of communication protected by the First Amendment can be involved in a restraint on closed shops. In the due process argument the union claimed that the anti-closed-shop statutes deprived it of the right to make any contract it chose with the employer; an attempt, in a sense, to resurrect the now obsolete theory under which laws forbidding yellow-dog contracts were once invalidated.[13] Today's fixed conviction that the states' power to legislate must not be put into a strait jacket by a broad interpretation of the due process clause leaves no room for the union's argument on this point.[14]

[11] Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., decided together with Whitaker v. North Carolina, 335 U.S. 525 (1949). The companion case, AFL v. American Sash & Door Co., 335 U.S. 538 (1949), upheld a similar Arizona statute.

[12] 336 U.S. 490 (1949). See Free Speech and Picketing for "Unlawful Objectives," 16 Univ Chi. L. Rev. 701 (1949).

[13] Coppage v. Kansas, 236 U.S. 1 (1914); Adair v. United States, 208 U.S. 161 (1907).

[14] This now familiar view was expressed again by the Court this year in Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220, 224 (1949), in upholding a South Carolina statute requiring separation of the undertaking and insurance businesses: "We cannot say that South Carolina is not entitled to call the funeral insurance business an evil. Nor can we say that the statute

The equal protection argument is somewhat more tenable. Where an anti-closed-shop statute is accompanied by an anti-yellow-dog contract statute, union and nonunion men, as a matter of form at least, concededly stand on an equal footing. The contention here, however, was that the statute denied equality by discriminating between organized labor and employers. The statute obviously does, as a practical matter, throw the weight of the state to some extent on the side of the employers. The Court declined to consider this contention seriously, since the acts forbade discharges either to encourage or discourage unions. "This circumstance alone," said the Court, answers the equal protection argument.[15]

The free speech argument, however, has greater force in the *Giboney* picketing case. "Peaceful picketing is the workingman's means of communication," the Court had said,[16] and had protected it by the free speech concept.[17] The *Giboney* case adds a major limitation to previously stated conceptions of the limits of picket-speech. No one had ever seriously contended that all picketing under all circumstances was beyond restraint. There may be "many restrictions upon peaceful picketing. Reasonable numbers, quietness, truthful placards, open ingress and egress, suitable hours, or other proper limitations . . . may be required," Justice Reed once summarized.[18] But in this case, none of those conditions was violated. The picketing here was enjoined because it attempted to induce conduct which was itself a violation of a valid state law. This decision, while not in conflict with any previous holding,[19] nonetheless makes sharp

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has no relation to the elimination of those evils. There our inquiry must stop." For careful analysis of the status of due process, and of the Daniel case see Broad Scope of State Regulatory Power Reaffirmed, 24 Ind. L.J. 451 (1949).

[15] Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 532 (1949).

[16] Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, 312 U.S. 287, 293 (1941).

[17] Thornhill v. Alabama, 310 U.S. 88, 103 (1940), begins the line, and AFL v. Swing, 312 U.S. 321 (1941), is perhaps its high spot.

[18] Carpenters and Joiners Union of America v. Ritter's Cafe, 315 U.S. 722, 738-39 (1941).

[19] The union relied principally on the Thornhill and Swing cases, the Ritter's Cafe case, the Meadowmoor case, and Bakery & Pastry Drivers Local v. Wohl, 315 U.S. 769 (1942). The Thornhill case is clearly distinguishable, since it involved a total restraint on peaceful picketing which violated no law. The Swing case held that freedom of speech in peaceful picketing overrode a common-law policy against stranger picketing, a point not here involved. The Meadowmoor and Wohl cases are very close because each involved strikes by vendors of the same sort as was involved here. Thus, these two cases and the instant case are equally attempts to restrain trade by keeping producers from selling to nonunion vendors. But the Meadowmoor case approved an injunction because of violence in the strike, and the dissent emphasized that there was no state statute aimed at the alleged restraint. 312 U.S. 275, 306 (1941). In the Wohl case, the state court had upheld an injunction because such picketing was found not to be a "labor dispute," and the Supreme Court found this an insufficient ground; but both the majority and a concurring opinion in that case reserved the possibility that the picketing might be

and clear something not fully perceived before: the states may properly limit picketing not only because of what the pickets *do* while they are picketing, but also because of the *object* for which they picket. The specific limitations mentioned by Justice Reed above are all directed against the act of picketing itself; in the *Giboney* case, the limitation is directed against the pickets' purpose.

The vital question raised is: What constitutional status is left to picketing? Can the states without restraint now prohibit picketing by systematically illegalizing all the types of employer conduct which pickets might seek to induce? If a state made it illegal (a) to have a closed shop; (b) to give wage increases beyond a certain point; or (c) to bargain collectively, could picketing for these objects then be restrained? If so, then the "workingman's means of communication" may be shut off entirely.

Under the *Giboney* rule, the answers to the foregoing questions may require an examination into the validity of the state law prohibiting the employer's conduct. Because the restraint-of-trade statute in this case was valid, picketing to induce its breach could be restrained. Presumably if anti-closed-shop statutes are valid, as the *Lincoln Federal* case holds them to be, picketing to induce their breach may also be restrained. The Court in the *Giboney* case mentioned no specific limits to this rule, except that the picketing must be "an integral part of conduct in violation of a valid criminal statute," and that the illegal object was the "sole" object of the picketing. The Court also stressed the fact that the restraint-of-trade statute was not aimed merely at a "slight public inconvenience or annoyance."[20]

These reservations give little aid in determining what are the constitu-

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restrained if, aside from violence or disorder, it were aimed at conduct otherwise unlawful. 315 U.S. 769, 775, 776 (1942).

In the Ritter's Cafe case, a construction union picketed the business place of a contractor's customer to induce the customer to withdraw his business from the contractor because the contractor was employing nonunion labor. Texas upheld an injunction against such picketing, in part because it violated the state anti-trust laws. The Supreme Court affirmed, not on this ground but on the ground that the place of business being picketed was too far removed from the actual dispute to give constitutional protection to the picketing. In the instant case the union seems to argue that since the majority in the Ritter's Cafe case did not rely on the anti-trust argument, it rejected it. Appellant's Brief, at 30, 31. The Court in the Giboney case described the Texas anti-trust contention as an afterthought of the Texas court, and in any case it was not seriously considered by the dissenters in the Ritter's Cafe case.

The Giboney case gains added significance because it was very ably briefed by the union, and thus amounts to a rejection of the best arguments that can be made for its point of view.

As the text states, the Giboney case reaffirms the "unlawful purpose" test as the measure of the validity of picketing. For extended analysis of that standard see 49 Col. L. Rev. 711 (1949), noting Mayer Bros. Poultry Farms v. Meltzer, 80 N.Y.S. 2d 874, 274 App. Div. 169 (1948).

[20] Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949).

tional limitations on a state's power to make illegal ordinary objects of picketing. In this respect, the two concurring opinions in the *Lincoln Federal* case may be helpful. Justice Frankfurter, in his concurrence, reviewed the role of the closed shop in labor history. Dealing with the issue in terms of the classical Holmes approach to due process, he found the objectives of closed-shop prohibition "not so unrelated to the experience and feelings of the community as to render legislation addressing itself to them wilfully destructive of cherished rights."[21] He did explore the factual issue of whether the legislation was "fatal to the survival of organized labor,"[22] and concluded that it was not. Unless we assume that this portion of his opinion was for no purpose, we must conclude that if he had found the legislation "fatal" to labor, he might have found it unconstitutional.

Justice Rutledge, in a concurrence joined by Justice Murphy, made very clear that in passing upon the right to restrain picketing, he was not passing upon the right to restrain strikes. Strikes, he thought, might well have a protected position under the Thirteenth Amendment, whether or not they were for the very same purpose as the picketing in the *Giboney* case.[23] Conceivably the argument may be developed that restraints on labor activities other than a restraint on strikes also compel involuntary servitude.

The *Giboney* case, along with the *Terminiello* case, indicates that the legal protection of free speech may well develop along the lines advocated by Professor Meiklejohn in his recent book, *Free Speech and Its Relation to Self-government*. He calls for a broader conception of free speech as applied to political matters and a narrower conception as applied to economic matters, such as labor disputes.

Since labor must find its basic legal protections not in the Constitution but in the statutes which its political influence helps pass, the case of *International Union, UAW* v. *WERB* points the direction for future efforts. Section 7 of the Wagner Act and the corresponding provision of the Taft-Hartley Act, provide that employees shall have the right "to engage in concerted activities for the purpose of collective bargaining."[24] The

[21] Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 538, 550 (1949).

[22] Ibid., at 547.

[23] Ibid., at 557. Compare Pollock v. Williams, 322 U.S. 4 (1944). This is not to suggest that there was a neatly chiseled Thirteenth Amendment argument. The union argued generally, "A state may not, to serve its notions of public policy, exempt from the area of economic conflict such issues as satisfactory wages, hours, working conditions, and the bargaining power indispensable to their attainment, or treat the peaceful efforts of working men to attain these objectives as evils within the allowable area of state control." Appellant's Brief, at 32.

[24] The text language is from the Wagner Act. Section 7 of that Act as amended by the Taft-Hartley Act is not significantly different for the purposes of this case.

unions contended that these provisions gave federal legal basis to a right to strike, "filling the field," and negating contrary state laws. In the instant case, the Wisconsin Employment Relations Board enjoined a series of recurrent work stoppages engaged in ostensibly for the purpose of holding "union meetings." The work stoppages involved were unquestionably "concerted activity" and were undoubtedly for the statutory purpose. The issue was thus narrowed to whether some kinds of "concerted activity" were outside the general protection of the federal statute because of some implied exception.

Justice Jackson, speaking for a majority of five, held that there were some implied exceptions. Sit-down strikes, mutinies, and strikes against the government, for example, had previously been held not protected by this provision, even though they had the required concert and purpose.[25] At this point, unfortunately, the opinion becames somewhat ambiguous. It is not clear whether recurrent intermittent work stoppages are outside the protection of Section 7 because (a) they are unprotected as a matter of *federal* law, and thus ineligible for the immunity afforded by federal labor legislation, or because (b) they are illegal as a matter of *state* law; i.e., illegal because Wisconsin chose to make them so. If the latter theory is the correct interpretation, then Section 7 has been given a narrow scope: the right to engage in concerted activity as a federal privilege lasts only until a state makes it illegal, and thus a state can remove any concerted union activity from the protection of Section 7 if it chooses.

The point is vital. If labor activities are outside the scope of major constitutional protections, and if such labor activities are now also removed from the protective covering of the Taft-Hartley Act, then states may do as they will with labor's "concerted activities." The showdown may come upon review of recent state laws forbidding strikes in public utilities, which, like any other strikes, are also "concerted activities for the purpose of collective bargaining." New Jersey[26] and Wisconsin[27] courts have recently held that under the instant decision the states are free to take public utility strikes out of the protection of Section 7 by declaring such activities "illegal." Even more significantly, the Supreme Court of Michi-

[25] NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939); Southern Steamship Co. v. NLRB, 316 U.S. 31 (1942); and United States v. United Mine Workers, 330 U.S. 258 (1947), respectively.

[26] State v. Traffic Telephone Workers, 27 L.R.R.M. 2071 (1949). Chief Justice Vanderbilt quotes the UAW case extensively, and concludes, "Thus the power still resides in the States in a proper case to prohibit strikes notwithstanding federal legislation."

[27] WERB v. Elec. Ry. Employees, 24 L.R.R.M. 2009 (1949), appears to construe the UAW case as giving the states unlimited power to limit the Wagner and Taft-Hartley provision by making illegal any strikes they choose.

gan has interpreted the *UAW* decision to uphold the requirement of Michigan law that strikes be approved by a majority vote of all employees in a bargaining unit.[28] But it is extremely doubtful that the *UAW* decision, although ambiguous, meant the Taft-Hartley Act protection to be dependent to this extent upon state predilections.[29]

MONOPOLY AND FREE ENTERPRISE

Unlike the preceding term, in which a very large portion of the cases arose from the trade regulation laws, the 1948 term presented almost no such disputes. A quarrel over the decree in long standing proceedings against the Ford Motor Company, and a case against clothing makers in Massachusetts are of limited significance beyond their particular facts.[30] The most important feature of the latter case was a renewed and unanimous assertion that the Sherman Act reaches not only activities "in commerce," but also those which "affect commerce." This quiet expansion of the Act gives it a reach far greater than some members of the present Court had previously thought it possessed.[31]

The two major anti-trust matters were the *National City Lines* and the *Standard Oil* cases.[32] Of the two, the former is probably the more important, since it can affect most anti-trust suits. The *National City Lines* case had been before the Court during the preceding term on contention that the defendant was entitled to a change of venue in the trial stage under the doctrine of *forum non conveniens*, a doctrine which the Court then held inapplicable to anti-trust suits.[33] Almost immediately thereafter, Congress passed the revised judicial code, which permitted the transfer, on a *forum non conveniens* theory, of "any civil action."[34] National City Lines

[28] "It is difficult, if not quite impossible, to read the decision in the Wisconsin case, the U.A.W. case, without coming to the conclusion that in the exercise of its police power a state may, by legislation, regulate the exercise of the right of employees to strike; providing such regulations are not in conflict with, or inconsistent with, federal regulation." International Union, UAW v. McNally, 24 L.R.R.M. 2261, 2266 (1949).

[29] The dissents by Justices Murphy and Douglas do not interpret the majority as going so far, although Justice Douglas does interpret the majority as giving the states unlimited power to determine "the manner of calling of strikes." 336 U.S. 245, 266 (1949). Justice Rutledge joined both dissents, and Justice Black concurred with Justice Douglas.

[30] Ford Motor Co. v. United States, 335 U.S. 303 (1948), and United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460 (1949), respectively.

[31] This topic is enlarged upon in connection with Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948), in the 1947 Term Article, at 6–7.

[32] United States v. Nat. City Lines, Inc., 69 S. Ct. 955 (1949), and Standard Oil Co. v. United States, 69 S. Ct. 1051 (1949), respectively.

[33] United States v. Nat. City Lines, Inc., 334 U.S. 573 (1948), discussed in the 1947 Term Article, at 10–11.

[34] 28 U.S.C.A. § 1404(a) (1948).

thereupon renewed its motion, and this time was upheld by the Supreme Court in the instant case.

Chief Justice Vinson, author of this year's *forum non conveniens* opinions, considered the effect of the new code on the Clayton Act, together with the Federal Employers' Liability Act, under both of which the applicability of the *forum non conveniens* doctrine had been denied.[35] It is quite clear from the legislative history that the experts who drafted the revised Code intended, as the Court held, to permit change of venue under that doctrine in FELA cases,[36] but there is no evidence that anyone had any such intention of affecting anti-trust suits. The Chief Justice's observation in the *National City Lines* case that "the change in anti-trust practice seems no more radical than the change in Federal Employers' Liability Act practice"[37] overlooks the fundamental difference in defense strategy in the two categories of cases.

Since FELA cases usually involve simple torts, it is not difficult to determine the most sensible place to bring the suit. Anti-trust cases, and particularly treble damage suits brought by private persons, are very different. If they involve conspiracies over large areas, the proper place for suit may be very doubtful. Suppose, for example, that the plaintiff is an independent motion picture theater owner with theaters in two districts, and that he complains of a conspiracy by twelve defendant corporations located in various jurisdictions, the overt acts of which were planned in New York and California and were committed in the districts in which his theaters are located. Where should he sue?

This problem is accentuated because the defense strategy, where the defendant is a large corporation, is frequently to wear out the plaintiff by protracting the suit indefinitely. Modern procedural devices, meant to facilitate litigation, are thus used to obstruct it.[38] Experienced anti-trust lawyers estimate that the *National City Lines* case will add some months to the already interminable period of litigation in such matters.

[35] The FELA problem was considered in Ex parte Collett, 69 S. Ct. 944 (1949), and Kilpatrick v. Tex. & P.R. Co., 69 S. Ct. 953 (1949).

[36] There may be doubt as to whether it was generally perceived that a change was being made in the FELA, but the official notes cite Balt. & O. R. Co. v. Kepner, 314 U.S. 44 (1941), the case holding forum non conveniens inapplicable in FELA cases, as being an example of what was changed by the revision.

[37] 69 S. Ct. 955, 957 (1949).

[38] Interviews with attorneys in several firms involved in treble damage suits reveal numerous instances in which more than two years have intervened between filing suit and trial. What with the range of motions to strike, to dismiss, for bill of particulars, plus now the change of venue, each of which permits of briefs and arguments, opportunities for delay are large; and interrogatories and depositions, complicated by motions to strike interrogatories, can make the pre-trial period interminable.

Suits have recently been transferred from district courts where they had already been pending for two years. Some district judges are transferring cases to get such clumsy matters off their dockets as much as for any other reason.[39] These are extensive consequences to result from interpretation of a Code revision which does not declare any deliberate intention on the point.

The other outstanding anti-trust case was *Standard Oil Co. v. United States*.[40] Standard sold about 25 per cent of the gasoline in several western states, much of it for industrial purposes. Half the gasoline it sold through service stations was sold through those it owned and the other half through "independents" which had contracts with Standard to sell its products exclusively. Standard's competitors had similar exclusive contracts with their independents. The action was brought by the government to enjoin Standard from utilizing these exclusive contracts.

Section 3 of the Clayton Act specifically forbids exclusive distribution contracts where their effect "may be to substantially lessen competition or tend to create a monopoly." Standard's principal defense was that these contracts did not in fact lessen competition; indeed, it contended that competition was aided by keeping independents in the distribution field, by assuring them a regular flow of gas, and by other means.

The issue was drawn in terms of the quantum of evidence which the defendants were allowed to introduce to substantiate their claims. The District Court in substance held that the government had proved its case when it showed that a "substantial" number of outlets and a "substantial" volume of products were involved. The court thereupon excluded evidence generally directed toward showing that Standard's method was used in good faith and was a generally beneficial method of meeting a difficult marketing problem. The Supreme Court, in a careful opinion by Justice Frankfurter, affirmed, declaring that a requirements contract violates Section 3 when "competition has been foreclosed in a substantial share of the line of commerce affected."[41] The opinion appears to establish a general rule, which may have very wide application to American trade practices: if any producer negotiates exclusive requirement contracts with a substantial number of distributors or controls a substantial portion of the market by such contracts, he violates Section 3 of the Clayton Act. As Justice Frankfurter shows, this appears to be exactly the result contemplated by the framers of the Act.[42]

[39] See, e.g., Shore Amusements, Inc. v. Paramount Pictures, Inc., No. 1120-47 (D.C. D.C., 1949), transferred June 27, 1949, by Judge Holtzoff; Cinema Amusements, Inc. v. Loews, 18 U. S. L. Week 2020 (1949).

[40] 69 S. Ct. 1051 (1949). [41] Ibid., at 1062. [42] Ibid., at 1061 n. 15.

The significance of the opinion is limited because a producer can so easily obtain the same benefits by other devices. To list only three: perhaps the oil companies will buy up the retailers, a course which the Court's opinions leave open to them;[43] or perhaps agency contracts will be used;[44] or—and informal conversations with persons acquainted with the problem indicate that this is a most likely possibility—the distributors will, as a matter of practice, continue to buy exclusively from one company whether or not they have contracts.

Justice Douglas, dissenting, protested that the opinion would compel vertical integration, thus forcing the independents out of the field. His fear was that other decisions of the Court had so weakened the operation of the anti-trust laws[45] that this practice (which he seemed to consider a violation of the Clayton Act, but an unimportant one) would be replaced by what he would consider more extreme violations of the Sherman Act. The independent would be supplanted, he feared, by the clerk.

One may doubt that the fate of the independent gas retailer is dependent to this extent on the life or death of the requirements contract; and one may also doubt that his status *now* is truly distinct from that of a clerk. As the Supreme Court itself has pointed out, the resort to small independent distributors by large concerns may be motivated by the handy insulation thus afforded from social security legislation, workmen's compensation, and other employer discomforts.[46] In short, the large concerns continue the independent status of some of their retailers for many reasons, and there is no way to know with assurance that the existence or nonexistence of requirements contracts controls its continuance. But it is true that other decisions to which Justice Douglas dissented have accelerated the growth of monopoly and make easy the avoidance of the *Standard Oil* rule.

TAXATION

There were two cases at the 1948 term involving the power of the states to tax exports. In one, the taxpayer was exporting a cement plant piecemeal. The California county in which he had purchased it assessed a prop-

[43] United States v. Columbia Steel Co., 334 U.S. 495 (1948), is a recent case in point.

[44] FTC v. Curtis Pub. Co., 260 U.S. 568 (1923).

[45] He listed United States v. United Shoe Mach. Co., 247 U.S. 32 (1918); United States v. U.S. Steel Corp., 251 U.S. 417 (1920); United States v. Int. Harvester Co., 274 U.S. 693 (1927); United States v. Columbia Steel Co., 334 U.S. 495 (1948); and his own opinion in United States v. Paramount Pictures, 334 U.S. 131, 173–74 (1948), insofar as he was unable to muster a majority for an immediate divestiture order. It was argued in the 1947 Term Article, at 12, that in anti-trust law, "much of modern doctrine is merely a series of fleabites to the elephant of 'unification.'"

[46] Bakery & Pastry Drivers Local v. Wohl, 315 U.S. 769, 771 (1942).

erty tax on segments of the property dismantled and crated for shipping, but not yet shipped on the tax assessment day. Justice Douglas for the Court held that until "the entrance of the articles into the export stream," there is no tax immunity.[47] The second case arose when the taxpayer, planning to ship oil to Canada, gathered a large quantity at Dearborn, Michigan, where it stayed 15 months because of wartime shipping restrictions. Dearborn claimed a property tax. Justice Frankfurter, for the Court, held that so long a storage broke the shipment and subjected the oil to tax, reducing the shipper's plan to the mere "intent" which had been insufficient in the cement plant case.[48] The result moves the export cases toward accord in this respect with the cases arising over state taxes on goods in interstate commerce.[49] Two decisions interpreting the Internal Revenue Code, *Comm'r v. Estate of Church*[50] and *Estate of Spiegel v. Comm'r*,[51] attracted widespread attention, but as in the past an extended discussion of this subject is outside the scope of the article.[52]

OTHER PROBLEMS OF BUSINESS

a) Power and Eminent Domain

Closely related to the public interest, the future development of government power projects may be dependent upon a question in eminent domain and constitutional law touched on by the Court in its 1948 term. This year, in *Grand River Dam Authority v. Grand-Hydro*,[53] as in many terms before, the Supreme Court came close to dealing with the ultimate question, but did not decide it.

The background law in the field can be analyzed in part by dealing with only two of the many distinguishable areas—the obligation of the government to pay for power rights and for irrigation rights.

Under well established principles, no one can own rights in the flowing water of navigable streams except by acquiescence or grant of the federal government. In the leading case, *United States v. Chandler-Dunbar Water Co.*,

[47] Empress Siderugica, S.A. v. Merced County, 69 S. Ct. 995 (1949).

[48] Joy Oil Co. v. State Tax Comm'n, 69 S. Ct. 1075 (1949).

[49] Minnesota v. Blasius, 290 U.S. 1 (1933), is the leading case in respect to the relation of delays and taxation of shipments under the commerce clause.

[50] 335 U.S. 632 (1949). [51] 335 U.S. 701 (1949).

[52] The cases have already received thorough analysis in the legal periodicals. See Bittker, The Church and Spiegel Cases, 58 Yale L.J. 825, 838 (1949); Conway, I.R.C. § 811(c)—The Church and Spiegel Interpretation, 34 Corn. L.Q. 376 (1949); Looker, Estate Taxation of Living Trusts: The Church and Spiegel Decisions, 49 Col. L. Rev. 437 (1949); Schrenk and Wellman, The Church and Spiegel Cases, 47 Mich. L. Rev. 655 (1949); Church and Spiegel in Perspective, 16 Univ. Chi. L. Rev. 711 (1949).

[53] 335 U.S. 359 (1948).

the Court said, "Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable."[54] On the other hand, in *United States v. Cress*[55] the Court recognized private ownership of the running water in a non-navigable stream.

The result of the *Chandler-Dunbar* rule is that there are at least two situations in which, when the government adversely affects private power holdings on navigable streams, it incurs no liability for compensation under the Fifth Amendment. First, if the government condemns land which others had thought might one day be used for a power project, it need not pay the so-called "power value" of the land, for the power value is an attribute of the flowing water, which already belongs to the government.[56] This means that normally the government must pay only the so-called "farm value" of the land. Second, if the government, by down-stream activities on a navigable stream, raises the water level of the whole stream within the high-water boundaries, thus depriving an up-stream private power project of its fall of water, the government is not required as a matter of constitutional law to pay for that loss.[57]

On non-navigable streams, however, opposite results will be obtained when the *Cress* rule is applied. Thus under the *Cress* rule the government would be required to pay the power value of land it condemns along non-navigable streams and also would have to pay for the loss of water power resulting from raising the level of a non-navigable stream.[58]

The same problems arise as to irrigation rights. If the irrigator has a vested interest in the use of the water, then the government must pay extra if it condemns his land, or must compensate him if, without condemning his land, it reduces the quantity of his irrigation water by altering the flow of the stream.

The same constitutional principles apply both to power rights and irri-

[54] United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 69 (1913). See also Scranton v. Wheeler, 179 U.S. 141, 163 (1900); United States v. Appalachian Electric Power Co., 311 U.S. 377, 427 (1940).

[55] 243 U.S. 316 (1917). See note 58 infra.

[56] United States v. Chandler-Dunbar Water Co., 229 U.S. 53, 69 (1913). Indeed, if developments have been made by private persons in a navigable stream without a federal license, they may be destroyed by the Government without cost to it. Ibid., and see United States v. Chicago, M., St. P. & P.R. Co., 312 U.S. 592, 599 (1941).

[57] United States v. Willow River Power Co., 324 U.S. 499 (1945), is the most recent such case.

[58] The latter is the Cress situation. The government raised the water level on a navigable stream, incidentally raising the level on a non-navigable stream and depriving Cress of a fall of water. The government was required to pay for this power loss.

gation rights.[59] Nor is the *Chandler-Dunbar* rule qualified in the western states by the fact that those states have the "appropriation" rather than the "riparian" system of water rights.[60] However, there may be a very important statutory difference between the law applicable to power rights and the law applicable to irrigation rights. A whole series of federal statutes dealing with water systems in the west, from the early Acts of 1866 and 1877 to the recent Flood Control Act of 1944, may well have established legal rights in the users of irrigation water which were never granted to power companies.[61]

In the past seven years, the government has twice asked the Court to extend the *Chandler-Dunbar* rule to non-navigable streams in power-right controversies.[62] While the *Chandler-Dunbar* case was carefully considered, and has been repeatedly followed, the *Cress* opinion on this point was brief and almost offhand, and subsequent decisions have held that it "must be confined to the facts there disclosed." Whether the Court will extend the *Chandler-Dunbar* rule remains a mystery. If it does so, the extension may follow markedly different courses as to the rights of users of water for power and the rights of users of water for irrigation by virtue of the statutory history in the latter field.

If the *Chandler-Dunbar* rule were extended to non-navigable streams, the right to compensation for both power claimants and irrigation claimants could be left to statutory control. Congress could regulate the compensation to be made for losses with an eye to realities which are not fully recognized by the broad constitutional principle of just compensation. If the *Chandler-Dunbar* rule were not extended, and power companies had to be paid for the loss of the flowing water as a matter of constitutional law, existing principles of the law of eminent domain would probably give them

[59] United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 706 (1899).

[60] On the distinctions between the two systems see generally Hutchins, Selected Problems in the Law of Water Rights in the West, U.S. Dept. Ag. Misc. Pub. No. 418 (1942). The "appropriation" doctrines apply equally to navigable and non-navigable streams, ibid., at 35 et seq., and are the product of state law. The Chandler-Dunbar rule, on the other hand, is a product of national constitutional law, and the plenary power of the federal government as to navigable streams at least is not qualified by the state law. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 703-9 (1899); Oklahoma v. Atkinson Co., 313 U.S. 508, 534-35 (1941).

[61] The basic early statutes are the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C.A. § 661 (1928); Act of July 9, 1870, 16 Stat. 218, 43 U.S.C.A. § 661 (1928); and the Desert Land Act of Mar. 3, 1877, 19 Stat. 377, 43 U.S.C.A. § 321 (1928). See also the Reclamation Act of 1902, 32 Stat. 388, 43 U.S.C.A. § 391 (1928). The most recent basic statute is the Flood Control Act of 1946, 60 Stat. 641. Arguably, e.g., Section 8 of the Reclamation Act, 32 Stat. 390 (1902), 43 U.S.C.A. § 383 (1928), yielded the federal plenary power as to irrigation interests.

[62] United States ex rel. TVA v. Powelson, 319 U.S. 266 (1943); United States v. Willow River Co., 324 U.S. 499 (1945). Both times the Supreme Court avoided the problem.

grossly excessive compensation. For example, under current principles of market value as the basis of constitutional just compensation, power value might be appraised on the basis of rates charged by power companies, which might in turn, perhaps due to defective state regulation, have been beyond all reason.[63]

In the *Grand River* case this year the Court once again put aside unanswered the question of whether it would overrule the *Cress* case. An Oklahoma state development authority condemned land for a hydro-electric project on a stream which was non-navigable but affected navigation on other streams. The state was licensed by the Federal Power Commission to proceed with its project, and it claimed by virtue of the federal license the right to stand in the same position as would the United States. The farm value of the land in question was $281,000 and the power value was $800,000. The Oklahoma Supreme Court awarded the latter figure.

The sole question before the Supreme Court was whether anything in federal law should affect the condemnation price of a state project operating under state law solely because of the federal license. The majority was thus able to avoid the *Chandler-Dunbar* and *Cress* alternatives by holding that since the federal license did not carry with it federal eminent domain principles, the valuation was left to Oklahoma law. Justice Burton for the Court specifically reserved the question as to the valuation if the United States had been the taker: "The United States enjoys special rights and power in relation to navigable streams and also to streams which affect interstate commerce."[64] Justice Douglas, for Justices Black, Murphy, and Rutledge, dissented, arguing that the license required that

[63] Valuation of utility property for condemnation purposes is complicated to such an extent that at least one state has held that ordinary condemnation proceedings may not be used for the purpose. Lone Star Gas Co. v. City of Fort Worth, 128 Tex. 392, 98 S.W. 2d 799 (1936). While valuation for eminent domain purposes is never simply a capitalization of utility earnings, those earnings are considered highly relevant. See Orgel, Valuation Under Eminent Domain, cc. xvii–xvix, and especially cases p. 708 n. 223. For a briefer statement see 18 Am. Jur. § 293. For an example of a claim that a "power right" on a non-navigable stream should be paid for on a basis of a hypothetical sales rate, see United States ex rel. TVA v. Powelson, 319 U.S. 266, 275 (1943). In a letter to the author, dated August 22, 1949, Joseph C. Swidler, General Counsel for TVA, stated: "Two problems need to be distinguished. If a court should allow power-site value as reflected in the market value of the land, that might, of course, result in substantially higher awards than would be made if power-site value were excluded altogether. If the courts were to go a step further and permit proof of power value by a showing of the capitalized earnings from a project which might be constructed on the site, as the landowners urged in the Powelson case, the results would be much more serious. To determine power value by the capitalization method requires making assumptions as to all the contingencies which would be involved in constructing and operating a project which does not exist and never will exist. The trial becomes a field day for expert witnesses and the result is pure speculation."

[64] 335 U.S. 359, 373 (1948).

federal valuation rules be applied and, more important, that therefore the *Chandler-Dunbar* rule should be invoked.

There are of course possible solutions to the valuation problem other than the basic approaches suggested above. The Court might undercut the whole difficulty by a progressively broader definition of "navigable," thus pulling more and more rivers under the *Chandler-Dunbar* rule.[65] It might avoid much of the problem by rigid adherence to the rule that power value need not be paid for land taken unless the power project for which the private owner claims compensation is either actually in existence or absolutely certain of completion, thus avoiding payment for power value which is at best a speculator's dream.[66] The latter method, of course, can apply only to valuation of land taken, and not to the situation in which private projects lose the fall of water by alteration of stream levels.

TABLE 1

	Land Amount	Total Amount	% Land to Total
Norris Project.....	$8,740,000	$32,269,000	27.1
Appalachia Project....	467,000	23,762,000	2.0
Ocoee No. 3 Project...	125,000	8,793,000	1.4
Nottely Project.....	441,000	5,384,000	8.2
Chatuge Project.....	1,151,000	7,036,000	16.4

The relation of land costs to other costs in project construction varies because different amounts of land are required for reservoir purposes at different projects, and because land values themselves vary. A few comparisons from the TVA showing the wide range in proportion of land costs are made in Table 1.[67]

The range in these five projects of from 1.4 per cent to 27.1 per cent for land costs is attributable to many factors. The Norris land was not only great in quantity but was, compared to the other four, rich and settled. Appalachia and Ocoee are in deep gorges forming natural reservoirs and requiring comparatively little land. Chatuge is in a comparatively flat area, requiring a much larger reservoir.[68] And yet the most important factor causing variation in land cost proportions may be compensable

[65] United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940).

[66] McGovern v. City of New York, 229 U.S. 363, 372 (1913); TVA v. Powelson, 319 U.S. 266 (1943).

[67] These data are taken from two reports of the Tennessee Valley Authority. The Norris Project, Tech. Rep. No. 1, at 612 (1939); and the Apalachia, Ocoee No. 3, Nottely, and Chatuge Projects, Tech. Rep. No. 5, vol. 2, 579, 598, 614, 626 (1948).

[68] Ibid., passim.

power value. The four projects other than Norris are all in what is generally called the Hiwassee Valley project of the TVA. They are part of the project considered in *TVA v. Powelson*,[69] the 1943 Supreme Court decision which held that, since Powelson's project was incomplete, TVA need not pay the power value of the land. Had the *Powelson* case been decided the other way, the land cost in each of these Hiwassee projects might have run to about four times what was actually paid.[70] Under such a result the ratio of land cost to total project cost would have remained comparatively low at Appalachia and Ocoee No. 3, but at Nottely and Chatuge it would have been extremely high.

This problem is most acute in the Missouri Valley, where over 100 projects are now in various stages of authorization or of dream. Hardly any has yet been started. It is obvious that a very large proportion of the tributaries of the Missouri are not navigable in any real sense. Many of them are completely dry for large parts of each year. Many of the projects are in flat lands, where large reservoirs will be required. Many are in little populated areas, where total power sales will be much smaller than in the populous Tennessee area.[71]

At the present time, costs must be figured so closely on Missouri Valley projects that a cost variation of one-hundredth of a cent for the production of each kilowatt-hour of electric power may make the difference between approval or disapproval of the project.[72] If land costs can range as high as a quarter of the entire cost of a project, then obviously the difference between the *Chandler-Dunbar* and *Cress* rules may be the difference between having irrigation, flood control, and power in some areas of the northern plains states or doing without them. In some areas, the demand for these services may be so great that the amount of land cost can do no more than make the services more expensive without prohibiting a project; but certainly in many instances, land cost will be conclusive.

At the 1949 Term, the Court may finally confront the issue so long postponed and either reapprove, overrule, or undercut the *Cress* decision. It has laid over to the 1949 term for reargument two cases which squarely raise the issue.[73]

[69] Note 67 supra.

[70] This was the approximate difference involved in the Powelson case.

[71] The foregoing information is acquired from informal interviews with engineers familiar with Missouri Valley projects.

[72] Information generally acquired from Bureau of Reclamation, U.S. Dept. of Interior.

[73] United States v. Kansas City Life Ins. Co., 74 F. Supp. 653 (Ct. Cl., 1947); United States v. Gerlach Livestock Co., 76 F. Supp. 87 (Ct. Cl., 1948).

b) Patents

While there were few patent cases at the 1948 term, those few did raise one issue important to the business community and to a survey of the function of the Supreme Court as an institution of government. That issue is: Will the Supreme Court ever make effective its repeated commands to the Patent Office to raise the standard of invention?

The three patent cases this year, except for the discussion they evoke of this question, were insignificant. An improved anti-perspirant was held not patentable; the interesting element of the case was the Court's adoption of the Second Circuit's proposition that "skillful experiments in a laboratory, in cases where the principles of the investigations are well known, and the achievement of the desired end requires routine work rather than imagination, do not involve invention."[74] A case involving a patent in the electric welding field is noteworthy primarily because the Court was unanimous in holding the patent valid.[75] This is probably the first time both Justices Black and Douglas have considered a claimed invention patentable since they have been on the Court. But the patent case of most general interest was *Jungersen v. Ostby & Barton Co.*[76]

In the *Jungersen* case, Justice Reed for the Court held invalid a patent for making molds for the reproduction of intricate types of jewelry. The majority was unimpressed by the process, in which a first copy was filled with wax by centrifugal force so that a model might eventually be made from the wax. Justices Frankfurter and Burton dissented, adopting the opinion of Judge Learned Hand in the court below, and Justice Jackson dissented separately. Justice Jackson posed the problem thus:

> It would not be difficult to cite many instances of patents that have been granted, improperly I think, and without adequate tests of invention by the Patent Office. But I doubt that the remedy for such Patent Office passion for granting patents is an equally strong passion in this Court for striking them down so that the only patent that is valid is one which this Court has not been able to get its hands on."[77]

Clever posing of a problem does not always answer it, and Justice Jackson suggests no judicial solution to terminate the Patent Office practice of consistently flooding the country with patents which could not possibly stand judicial scrutiny. From 1927 to 1940, the number of patent applications ranged from 60,000 to 96,000 a year, and the number granted ranged

[74] Mandel Bros. v. Wallace, 335 U.S. 291, 295 (1948).

[75] Graver Tank & Mfg. Co. v. Linde Air Prod., 336 U.S. 271 (1949). However, a petition for rehearing has been granted. The case is No. 2 on the 1949 Term docket.

[76] 335 U.S. 560 (1949). [77] Ibid., at 572.

from 42,000 to 56,000 a year.[78] It is doubtful that even the thoughtful friends of the patent system would deny the invalidity of an enormous number of the hundreds of thousands of patents granted in that period.[79]

The existence of an administrative agency grinding out patents far faster than the courts can possibly invalidate them, results in a perpetual and head-on conflict between that agency and the courts which Professor Currie has described thus: "The two institutions charged with the application of the patent law . . . are, for reasons which are both ideological and institutional, poles apart in their positions on this fundamental issue."[80]

The warfare of the courts against the Patent Office has been intensified by the attitude of the New Deal court, but in no sense began with it. The

TABLE 2

SUPREME COURT TREATMENT OF PATENTS, 1900–1940

Date	No. of Cases	No. Valid Patents	No. Invalid Patents	No. Not Infringed	% Invalid or Not Infringed
1900–1905	9	2	3	4	78
1906–10	7	3	1	3	57
1911–15	4	4	0	0	0
1916–20	16	5	9	2	69
1921–25	14	3	8	3	79
1926–30	12	3	5	4	75
1931–35	14	3	11	0	79
1936–40	15	0	13	2	100

data in Table 2 are taken from a statistical study prepared by Judge Evans.[81]

Shifts in the standard of invention are difficult to perceive since each case is factual, each is unique, and hence ungovernable by a verbal formu-

[78] Patent Office Report for 1946, 29 J. Pat Off. Soc. 83, 88–89 (1947). The number of patents granted fell off from 47,924 in 1940 to 27,587 in 1946, a decline attributed by the report to lack of personnel.

[79] One estimate placed the number at 50 per cent. Evans, Some Stray Thoughts of a Federal Judge on Our Patent System and Its Operation, 27 J. Pat. Off. Soc. 293, 307 (1945). Mr. William H. Davis has said, "[A] basic deficiency in the operation of the Patent Office, which is all the more deplorable because if it were remedied the Patent Office would do a service to American industry of really tremendous value, is that the Office grants too many invalid patents." Davis, Proposed Modifications in the Patent System, 12 Law & Contemp. Prob. 796, 801 (1947). Professor Stedman observes that "the number of spurious patents . . . has been so large as to arouse much discussion and serious concern," and attributes the situation mainly to "the difference between the standards of invention applied by the Patent Office and those applied by the courts." Stedman, Invention and Public Policy, 12 Law & Contemp. Prob. 649, 657 (1947).

[80] Currie, Introduction [to the Patent System], 12 Law & Contemp. Prob. 645, 646 (1947).

[81] Evans, Disposition of Patent Cases by the Courts, 24 J. Pat. Off. Soc. 19, 23 (1942).

la. For this reason it is also difficult for the Court to control the Patent Office. It is hard to conceive of any set of words which could effectively govern this year's three cases alone, for what is there in common among an anti-perspirant, an electric welding process, and a new method of making jewelry? Hence the Supreme Court has offered little by way of formula in the past ten years which was new, beyond the "flash of genius" test in *Cuno Engineering Corp. v. Automatic Devices Corp.*[82] Certainly the modern attitude, whether or not there is any formula to express it in terms of a standard of invention, has come to require that patent monopolies be granted only when they are most clearly deserved. With the strengthening of the attitudes against all monopolies, there has been a stiffening of attitude as to the patent monopoly.[83]

Dominant in the continuance of the flood of invalid patents, more responsible than the bizarre administrative system of the Patent Office itself,[84] is the refusal of the Patent Office staff to change its attitude to conform to the judicial attitude. Of course administrative agencies are supposed to obey the law as the courts declare it, but there is no wilfulness like that of the government employee who violates the law for what he fancies is the public good. Judicial mandates are easily evaded, and everyone in the Patent Office knows that America's welfare requires "a strong patent system"[85]—a euphemism for plentiful patents. The result is insubordination in good faith.

A recent reading of a ten year file of the *Journal of the Patent Office So-*

[82] 314 U.S. 84 (1941). Mr. Jo Baily Brown, a distinguished patent lawyer, in an extended and penetrating statement analyzes the shift of judicial attitude toward patentability as a shift from willingness to accept the trivial as inventions to a requirement that inventions, to deserve patents, must be "revolutionary or pioneer mental creations." He concludes, "The lower courts, under the influence of the Supreme Court, have shown a growing tendency in the past ten years to touch lightly on cases like *Loom Co. v. Higgins*, 105 U.S. 580, and the *Eibel Process* case, 261 U.S. 45, and to emphasize the law of cases like Atlantic v. Brady, 107 U.S. 192." Brown, Developments in the Patent Laws as Affected by Adjudications, 22 J. Pat. Off. Soc. 587 (1940).

[83] Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661 (1943), is a recent example. For brief notes on the most recent cases on this topic see the 1946 Term Article, at 15–16; 1947 Term Article, at 11.

[84] The administrative system of the Patent Office is described in Hamilton, Patents and Free Enterprise (1941).

[85] The First Report of the National Patent Planning Commission, quoted in Dodds and Crotty, The New Doctrinal Trend, 30 J. Pat. Off. Soc. 83, 84 (1948), says of the patent system, "It is the . . . basis upon which our entire industrial civilisation rests." Thomas Edison had a somewhat different view of the results of the operation of the patent system: "The long delays and enormous costs incident to the procedure of the courts have been seized upon by capitalists to enable them to acquire inventions for nominal sums that are entirely inadequate to encourage really valuable inventions. The inventor is now a dependent, a hired person to the corporation. The administration of the law is the cause." Statement from 1912 Cong. Hearing, quoted in Stedman, op. cit. supra note 79, at 660.

ciety, a semi-official publication, reveals that the Patent Office takes virtually every possible attitude about their consistent rebukes from the courts except one: nowhere does one find evidence of a resolution to conform to the statutes as interpreted by the judiciary. The attitude, rather, is that the courts, and particularly the Supreme Court, are The Enemy, to be thwarted by every ingenuity of which the Office is capable. The whole temper of the place is that decisions which might be thought to raise the standard of invention are explained away as insignificant; while decisions which seem to lower the standard are glorified.[86] The *Journal* carries enthusiastic admonitions to its readers to "check the torrent of baleful judicial action."[87]

Two excerpts will perhaps convey the tone. An editorial in 1943, headed "Flash of Genius—Quenched?" said:

> From the beginning the bench and bar concerned with patent matters took a dislike to this new character, and either refused to accept him into their scheme of things, dismembered him by analysis, attempted to show him up as an imposter posing under a new name without any new attributes, or merely noted his existence and ignored him.[88]

The second is an account of a lower court opinion which attempted to apply the "flash" test. The heading suggests the horror of the idea "The Flash of Genius Doctrine Approaches the Patent Office." The story continues

> The 'flash of genius' test for invention has been received by the patent bar with irreverence, considering its high sponsorship. So long as it remained a fiction on Mt. Olympus, it was not intolerable. That it would filter down to the lesser courts was recognized as probable but the hope remained that it would be modified, restricted, or abandoned before the danger went too far.[89]

[86] A considerable amount of ink was expended to prove that the "flash of genius" test left the law exactly as it had been before. For example, the principal examiner, Div. 12, Pat. Off., wrote, "It is the conclusion of the writer that the standard of invention as generally followed in the Patent Office has not been raised by the much discussed Cuno v. Automatic Devices . . . and that even this standard remains qualified by the exception set forth in Goodyear v. Ray-O-Vac, 321 U.S. 275." Spintman, Has the Standard of Invention Been Raised?, 27 J. Pat. Off. Soc. 422 (1945). And see Nielsen, Flash of Genius, 24 J. Pat. Off. Soc. 371, 374 (1942), concluding that "the facts of the case do not warrant the inferences that any new measure of patentability has been instituted."

[87] Gottschalk, Further Comments on Recent Patent Decisions and Current Trends, 26 J. Pat. Off. Soc. 151, 188 (1944). The author is patent counsel for the Corn Products Refining Co., and is not associated with the Patent Office.

[88] 25 J. Pat. Off. Soc. 771 (1943).

[89] Sellers, The Flash of Genius Doctrine Approaches the Patent Office, 26 J. Pat. Off. Soc. 275 (1944). The frightening decision was Potts v. Coe, 140 F. 2d 470 (App. D.C., 1944). The Court of Customs and Patent Appeals on occasion has dug in its heels as deeply as the Patent Office. See In re Shortell, 142 F. 2d 292 (Cust. & Pat. App., 1944).

Note the "danger." The Supreme Court had formulated a rule to which the patent bar "took a dislike" and "refused to accept." With a lower court actually attempting to apply the Supreme Court mandate, rendering it no longer merely "a fiction," there was grave "danger" to the Patent Office itself.

The Patent Office intransigence is attributable to many factors, few of which the Supreme Court can correct. The nonadversary system under which most patents are granted means that examiners are rarely given both sides of a case;[90] the training of an examiner is not calculated to arouse his concern in a public interest other than that which results from patent grants; and, though this is not to imply an impropriety, for none is suspected, he can scarcely escape knowing that his own economic future outside the Patent Office lies with private concerns interested in obtaining patents.[91] As a result patent examiners seem rarely to ask themselves: How can I cheerfully, effectively, and in a spirit of full cooperation with my *judicial* superiors translate the attitude reflected by their opinions into the living law of the patent system?

From the standpoint of the institutional history of the Supreme Court, the resistance of the Patent Office is of peculiar interest because it opens the question of whether the Supreme Court can make itself effective when met by a determined challenge. To date the answer appears to be in the negative. If the Court continues to hear only one to three patent cases a year, the defiance can continue indefinitely. A Court hearing, as in the past two years, 120 cases a year in the entire field of the law is a poor match for an administrative agency which in a year can grant up to 50,000 patents.

Hence the solution which Justice Jackson derides is clearly not a good solution; but it is the only course left, unless the Supreme Court is ready to quit the contest altogether. In other fields the Court has on occasion shown that it means business and wants lower tribunals to follow the law it has declared;[92] and perhaps it will eventually do the same in the

[90] It is widely believed that the recent Patent Commissioner, Mr. Casper Ooms, went into office sincerely determined to improve the operation of the Patent Office, and that he found the task more than one man could do. Ooms has observed that the Patent Office itself would not grant patents in most cases in which the patent is eventually held invalid if it had before it the same elaborate data which is given a court. Address quoted in Smith, Recent Developments in Patent Law, 44 Mich. L. Rev. 899, 906 (1946).

[91] The foregoing comments are taken from informal remarks of an attorney with wide experience in patent matters.

[92] The Court appears to be making major progress in another long term dispute, this time with lower courts and in regard to jury trials in civil cases. The effort of the Court to bring district courts into closer conformity with the Supreme Court's conception of the meaning of

patent field. If the "Patent Office passion for granting patents" is not at least matched in the Supreme Court by "an equally strong passion . . . for striking them down," then the Patent Office will surely escape the "danger" that the Supreme Court of the United States will promulgate anything more than what the *Journal* calls "fictions from Mt. Olympus."

c) Classifications and Equal Protection

The death of substantive due process as a control of legislation has been followed by an effort to give new vitality to the equal protection clause, so that it might serve as a substitute avenue for invoking judicial review. That effort made no important headway this year.

Wheeling Steel Corp. v. Glander[93] invalidated an Ohio tax on foreign corporations doing business in that state on the ground that, since there was no equivalent tax on domestic corporations, the law denied equal protection. Justice Douglas' dissent, joined by Justice Black, asserted that the term "person" in the first section of the Fourteenth Amendment extends to "natural and not artificial persons." Conceding that the Court had held to the contrary since 1886,[94] Douglas contended, as had Black in his first year on the Court, that this line of cases should be overruled. Historical research now makes quite clear that inclusion of corporations within the term "person" was not specifically contemplated by those who passed and ratified the Fourteenth Amendment.[95] And yet for purposes of historical interpretation the significance of the word "person" ought not to be considered separately from the meaning of the privileges and immunities, due process, and equal protection clauses of the Amendment on which it is de-

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the civil jury provision of the Seventh Amendment is reviewed extensively in Wilkerson v. McCarthy, 336 U.S. 353 (1949), rehearing den. 336 U.S. 940 (1949), in the opinion of Justice Douglas and its appendix. In the civil rights field the Court appears to end a long battle over post-trial procedures in Illinois with a peremptory command this year. See note 117 infra and text. It previously took firm action with respect to the fifth circuit's attitude on review of the NLRB. NLRB v. Waterman Steamship Corp., 309 U.S. 206 (1940). But the Patent Office, behind its barricade of factual variations from case to case, may prove impregnable to reproof.

[93] 69 S. Ct. 1291 (1949).

[94] Santa Clara v. So. Pac. R. Co., 118 U.S. 394, 396 (1886).

[95] The leading study is Graham, The "Conspiracy Theory" of the Fourteenth Amendment, 47 Yale L.J. 371 (1937), 48 Yale L.J. 171 (1938). An exhaustive and excellent unpublished study concluding that the term "person" as used in the Fourteenth Amendment was not originally understood to include corporations is James, The Framing of the 14th Amendment (1939), an unpublished Ph.D. Thesis at the University of Illinois. The writer has recently completed, in conjunction with Mr. Robert Munro, a reasonably comprehensive study of the original materials on the Fourteenth Amendment for a forthcoming article on the origins of equal protection, revealing that for the years 1866-68 there was no evidence of any kind that the word "person" was intended to include corporations.

pendent and which have undergone even more radical distortions.[96] The proper question therefore is whether the Court ought to return the entire section to its original meaning.

In *Railway Express Agency v. New York*[97] Justice Jackson also expressed basic notions about the equal protection clause. The Court held valid a New York City ordinance which purported to be a safety regulation. It prohibited Railway Express from using its 1,900 trucks in New York City for general advertising, but permitted trucks to be used for advertisement of the owner's own commodity.[98] The Court found this to be a reasonable classification, leading one to conclude that self-advertising attracts no attention.

Justice Jackson, concurring, expressed his basic philosophy on the difference between due process and equal protection: "For my part, I am more receptive to attack on local ordinances for denial of equal protection than for denial of due process, while the Court has more often used the latter clause."[99] The difference, he thought, was that invalidation of a regulation on due process grounds leaves a problem beyond regulation at all; while invalidation under equal protection means merely that it must be regulated on a more general level. Equal protection thus protects against arbitrariness because it precludes officials from abusing a minority, and thus escaping "the political retribution that might be visited upon them if larger numbers were affected."

A majority made easy work of a claim that a Michigan statute was invalid which precluded women from serving as bartenders unless they were the wives or daughters of male owners.[100] Women bartenders generally are thus excluded, and a woman owner can neither keep her own bar nor have her daughter do so. The Court thought that so long as Michigan might conceivably suppose that morals were improved by keeping unprotected ladies from behind the bar, it could not gainsay Michigan's right to insist on that protection.

[96] The studies referred to in note 95 supra induce the conviction that "privileges and immunities" were meant to include all of the Bill of Rights, and probably a good deal more of an undefined sort; that "due process" was meant to be wholly procedural; and that "equal protection" was intended to have far greater effect in achieving genuine equality in race relations than it has ever been given.

[97] Ry. Express Agency v. New York, 336 U.S. 106 (1949).

[98] Municipalities have wide latitude to regulate advertising on their streets. Valentine v. Chrestensen, 316 U.S. 52 (1941). And numerous cases uphold regulations of some similarity to that in the instant case. See particularly Packer v. Utah, 285 U.S. 105 (1932); but cf. as an unreasonable classification an ordinance discussed in Murphy, Inc. v. Westport, 131 Conn. 292, 40 A. 2d 177 (1944), which permitted professional people only to post signs.

[99] 69 S. Ct. 463, 467 (1949).

[100] Goesaert v. Cleary, 335 U.S. 464 (1948).

The barmaid case illustrates that equal protection is far indeed from being a serious control over state economic legislation. The usual approach is that unless a regulation is unreasonably discriminatory on its face, it is valid. Hence, says the Court, "we cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling."[101] Justices Rutledge, Douglas, and Murphy, dissenting, thought this legislation palpably discriminating.[102]

It is exceedingly improbable that equal protection will play a significant role in respect to economic legislation so long as courts decline to explore the facts. In the field of racial discriminations, the Court normally requires full details as to the exact situation, as, for example, when it is charged that schools for white and colored persons are unequal.[103] Similar procedure in the economic field—though as discussion above indicates, this would be far indeed from the contemplation of those who passed the Amendment—would make equal protection a very substantial control over commercial laws.

III. Civil Rights

During 1948–49, civil rights, although playing a less dramatic role, remained in substantially as precarious a position as they had been the year before. The election made superficial difference in the intensity of the "loyalty program," as the purge of government employees was called, but the prying-machine had become institutionalized, and continued to run on.[104] A President was elected on a strong civil rights platform which included steps toward equal treatment of the races, but his program was quickly stopped by filibusters and abandoned. Small race riots occurred in St. Louis and Washington, D.C., because of efforts to stop segregation at public swimming pools. The House Committee on Un-American Activities encountered considerable resistance when it attempted to censor the

[101] Ibid., at 467.

[102] The arguments pro and con the lady at the spigot are collected in "Bar Maids Come Back," N.Y. Times, p. 27, col. 1 (Mar. 18, 1945).

[103] Annotation, 103 A.L.R. 713 (1936).

[104] A government employee was forced to defend himself against a written charge of disloyalty because he had allegedly "spoken critically of the American Ambassador to Russia"; and another—a Republican, as a matter of fact—was brought to the loyalty bar because many years ago he contributed seventy-five cents when the hat was passed at a dubious public meeting. For the first time some F.B.I. files were published at a trial this year in Washington, D.C., and turned out to be enormous dossiers of information largely insignificant. N.Y. Times, § 1, p. 1, col. 1 (June 8, 1949); Ibid., § 1, p. 1, col. 8 (June 9, 1949). The subject of loyalty purges is thoroughly considered in Emerson and Helfeld, Loyalty Among Government Employees, 58 Yale L.J. 1 (1948).

school books of the nation; but a group of the country's highest educators adopted a statement endorsing the purge of political undesirables from their own faculties.[105]

In this atmosphere of rising tension, the Supreme Court civil rights problems seemed almost academic, a struggle over fine points when fundamentals were elsewhere in issue. To this, the most substantial exception was *Terminiello v. Chicago.*[106]

Terminiello, a notorious associate of Gerald L. K. Smith, gave a speech in Chicago. The auditorium in which he spoke was surrounded by enemies of his cause, and filled with his friends. The outsiders created disturbances, throwing stones through the window, and otherwise threatening riot and great violence. This in turn incited the group within. Terminiello's speech, which was violently anti-Semitic, contributed nothing to the peace of the occasion. He inflamed his auditors with accounts of alleged Jewish misdeeds, such as a claimed conspiracy to inject all Germans with syphilis germs. He also spoke of the group outside as "slimy scum." It does not appear, however, that his supporters took physical action other than self defense. He was found guilty of breach of the peace, the court charging the jury in part that a breach of the peace included conduct which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." His counsel did not specifically object to this particular portion of the charge, though they did generally preserve his rights under the Fourteenth Amendment at all possible points. The significance of that passage was not considered in the Illinois appellate courts or before the Supreme Court until the opinion was announced.

The Court, in an opinion by Justice Douglas, felt that in view of the charge it was unnecessary to consider whether Terminiello's language itself was entitled to Fourteenth Amendment protection. The Constitution, he wrote, does not permit making an offense of conduct which "invites dispute" or "creates a disturbance." Indeed, said the Court, the First Amendment would be flabby stuff if it extended only to speech which never invited dispute.

The opinion is the clearest Supreme Court utterance squarely on the rights of speakers threatened by hostile persons.[107] Whether the police can

[105] N.Y. Times, § 1, p. 1, col. 8 (June 9, 1949).

[106] 69 S. Ct. 894 (1949).

[107] Hague v. CIO, 307 U.S. 496 (1939), had rejected the argument that disorders by the opponents of the speaker could be used as a pretext to suppress speech, but the case was distinguishable, though thinly, on the ground that in the Hague case the law enforcement officers themselves fomented the disorder. The general topic of the right to prohibit assembly or speech when violence is feared is exhaustively treated in Prohibition of Lawful Assembly when Op-

take the easy way out by jailing the speaker instead of disciplining a threatening crowd deserved a new Supreme Court consideration. The *Terminiello* case put the weight of the Constitution with the better cases of several jurisdictions.[108]

Chief Justice Vinson dissented solely on the ground that the question considered by the Court had not been saved in the record, stating that if it had been saved, he would have agreed with the majority. Justices Frankfurter, Burton, and Jackson dissented on that ground and also on the merits. The Jackson dissenting position is particularly important because it meets the majority head-on at the central issue decided. His position is that valuable as free speech may be, it can be limited where it will result in disorder. Justice Jackson worried that the "doctrinaire" approach of the majority would turn the Bill of Rights into a "suicide pact." As always, he would cherish civil rights, but he would be practical about it.

Another colorful free speech case was *Kovacs v. Cooper*,[109] in which the Court held valid a Trenton, New Jersey, prohibition of sound trucks. Last year the Court made the fairly obvious decision that if sound trucks were to be licensed, it must be on a completely nondiscriminatory basis; but it left undecided the right of a city to make complete prohibition.[110] What was done this year is somewhat confused, because there were three opinions for the five Justice majority, and two dissents for the four dissenters. Justice Reed, for three of the majority Justices, declared that total prohibition of sound truck use was "probably unconstitutional,"[111] but rested this opinion on the ground that cities could control the volume of sound trucks and that here the defendant had been guilty of "raucous noise."[112] The dissent of Justice Black rested primarily on the enormous

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posed by Threat of Violence, 24 Ind. L.J. 78 (1948), on which much in the following paragraphs is based. See also Verbal Acts and Ideas—The Common Sense of Free Speech, 16 Univ. Chi. L. Rev. 328 (1949).

[108] Last year the Court of Appeals for the Eighth Circuit was required to correct a district judge who permitted police to prevent a meeting of Jehovah's Witnesses because the townspeople were hostile to them. Sellers v. Johnson, 163 F. 2d 877 (C.C.A. 8th, 1947), cert. den. 332 U.S. 851 (1948). Several attempts have been made to suppress anti-Semitic newspapers because they would create anger and incite to violence against the publisher. See Dearborn Publishing Co. v. Fitzgerald, 271 Fed. 479 (D.C. Ohio, 1921); People v. Downer, 6 N.Y.S. 2d 566 (1938); cf. Near v. Minnesota, 283 U.S. 697, 721 (1931). In the leading English case, Salvation Army parades had been attacked by hoodlums and finally resulted in a riot of over 1,000 persons. Yet when police attempted to stop the Army from parading again in the face of yet another mob, the court held the police without power to do so. Beatty v. Gillbanks, 9 Q.B.D. 308 (1882).

[109] 336 U.S. 77 (1949).

[110] Saia v. New York, 334 U.S. 558 (1948).

[111] 336 U.S. 77, 82 (1949).

[112] Ibid., at 83, 87.

usefulness of inexpensive sound trucks for the purpose of communicating ideas in a world in which all other means of mass communication are dominantly in the hands of persons of wealth."[113]

On the basis of the precedents, Justice Reed seems to have all the best of it. The Court in the past has held, essentially, that the state cannot substitute its judgment for that of the individual as to whether he wishes to receive the message of another. Thus a city cannot prohibit door-to-door circulation of leaflets, unless the individual posts on his own house that he wishes no intruders.[114] The owner of the company town cannot keep those who convey information away from his town, because the individuals who live there may wish to receive it.[115] But at all times the right of the individual as to what he would hear has been as well preserved as the right of him who would speak.

The sound truck batters down this defense of the auditor, leaving complete control of communication to the speaker. The right of choice as to what one says is not of greater importance than the right of choice as to what one hears, and if sound trucks roam the streets, the passer-by who wishes to be left alone has no protection. Justice Reed stressed the helplessness of the unwilling listener. Justice Black, in dissent, contended that loud-speakers could be controlled in volume, and kept off busy streets though not off all streets. But it is hard to find in the Constitution a requirement that anyone, whether he lives on a busy street or a quiet one, can be compelled to hear a message which he does not choose to hear.

In the area of criminal procedure, including court-martial procedure,[116] there were several noteworthy decisions. The most outspoken pronouncement of the Court during the year was the granting of eight petitions by imprisoned persons for certiorari to various Illinois courts. All eight cases were remanded with the admonition, "If there is now no post-trial procedure by which federal rights may be vindicated in Illinois, we wish to be advised of that fact upon remand of this case."[117] Legislation passed in

[113] See, for example, the various reports of the Univ. Chi. Comm. on a Free and Responsible Press (1947); Ernst, The First Freedom (1946).

[114] Martin v. Struthers, 319 U.S. 141 (1943).

[115] Marsh v. Alabama, 326 U.S. 501 (1946).

[116] United States ex rel. Hirshberg v. Cooke, 336 U.S. 210 (1949), held that Navy personnel are not subject to court martial during a second enlistment for offenses committed during the first. Wade v. Hunter, 335 U.S. 907 (1949), held that a soldier was not placed in double jeopardy when his court martial was suspended in the middle due to the "tactical situation" of the military and he was later tried anew. Humphrey v. Smith, 336 U.S. 695 (1949), held that the lack of a full and fair pre-trial investigation in accordance with Article of War 70 was not "jurisdictional," i.e., was not a gross enough error to be subject to judicial review.

[117] Young v. Ragen, 69 S. Ct. 1073 (1949).

Illinois after the Court's order has established proper procedure there.[118]

The case of most general importance in criminal procedure was *Upshaw v. United States*,[119] which held that a confession obtained during a thirty-hour period after arrest without warrant could not be used against the defendant, whether or not it was obtained by coercion. Justice Black for the majority of five stressed that this was an interpretation of the Federal Rules of Criminal Procedure, and not a constitutional decision, but it is nonetheless applicable in all federal prosecutions. Rule 5 (a) of the Criminal Rules provides that persons must be formally charged "without unnecessary delay," and thirty hours of waiting for a confession is obviously not "without unnecessary delay." The case called for and received a routine application of *McNabb v. United States*.[120] Four Justices joined in a dissent by Justice Reed, the pithiest section of which summarized the position of all those who have criticized the *McNabb* rule—the police, the House of Representatives, some states, and some law reviews. "Today's decision," said Justice Reed, "puts another weapon in the hand of the criminal world."[121]

The case thus poses a question with which some Justices felt themselves confronted several times during the term: How shall I choose between constitutional ideals and efficient law enforcement? The majority on the issue of speedy arraignment in the *Upshaw* case are also the Justices most alert to strike down forced confessions, and to them the speedy arraignment rule is one method of preventing such forced confessions. Justice Reed, in his dissent, pointed out that the defendant is protected against the use of forced confessions when it appears in fact that there was force; although he dissented in two of the three cases he cites exemplifying the rule against forced confessions.[122] In short, the dissenters in the *Upshaw* case, though they certainly do not approve of forced confessions, are less troubled about them in particular cases than are the majority.

This was further illustrated by a group of forced confession cases this

[118] The case was treated as front page news in the St. Louis Post Dispatch (June 6, 1949). Such publicity, coupled with the strenuous efforts of a large group in Illinois including Mr. Albert E. Jenner, Jr., President of the Ill. State Bar, resulted in passage of a bill at the 1949 legislative session which establishes an effective post-trial procedure. St. Louis Post Dispatch, p. 8a (July 3, 1949). See also Katz, An Open Letter to the Attorney General of Illinois, 15 Univ. Chi. L. Rev. 251 (1948); Power to Appoint Counsel in Illinois Habeas Corpus Proceedings, 15 Univ. Chi. L. Rev. 945 (1948); A Study of the Supreme Court, 15 Univ. Chi. L. Rev. 107, 126–31 (1948).

[119] 335 U.S. 410 (1948). [120] 318 U.S. 332 (1943). [121] 335 U.S. 410, 436 (1948).

[122] Haley v. Ohio, 332 U.S. 596 (1948); Malinski v. New York, 324 U.S. 401 (1945). In Ashcraft v. Tennessee, 322 U.S. 143 (1944), Justice Reed was with the majority.

year.[123] In the case of *Watts v. Indiana*, the defendant was held for six days without being arraigned, during part of which he was kept in solitary confinement in a cell called "the hole." He was questioned in relays during virtually all of each night but one, and was often interrogated during the days as well. He finally produced a confession satisfactory to the police, on the basis of which he was convicted. In *Turner v. Pennsylvania*, the defendant was held incommunicado and without charge through five days of questioning, although he was interrogated for shorter periods than Watts. In *Harris v. South Carolina*, the defendant, an illiterate Negro, was arrested on Friday, held until Monday before he was told that he was suspected of murder, and was then interrogated in relays for most of each of three days before he "confessed." In the *Watts* and *Harris* cases there was the usual conflict of testimony as to physical abuse. In all three cases the Court, with the leading opinion by Justice Frankfurter in each, held that the convictions must be set aside.

The four Justices who had dissented in the *Upshaw* case also dissented in these three cases. The position of Justice Jackson, speaking for the group, was that as long as violence is not used, simple interrogation without counsel for protracted periods of time is no violation of a right, particularly because "once a confession is obtained it supplies ways of verifying its trustworthiness."[124] He granted that "arrest on suspicion and interrogation without counsel . . . largely negates the benefits of the constitutional guaranty of the right to assistance of counsel,"[125] but this he seemed to consider a necessary part of the cost of law enforcement.

The foremost practical difference between the two groups of Justices on this issue is the difference in the extent to which they believe that violent abuse of prisoners follows automatically from secret questioning. For example, the *Harris* case interrogation was of the relay type by groups of officers in a room eight feet by eleven. Harris asserted that at one point he was struck with force. The officer said he merely placed a hand on Harris' shoulder. The dissent presumably believes the officer. The majority presumably believes that episodes which give rise to such divergencies should not be allowed to occur in the first place. As Justice Frankfurter put it, "To turn the detention of an accused into a process of wrenching from him evidence which could not be extorted in open court with all its safeguards, is so grave an abuse of the power of arrest as to offend the procedural standards of due process."[126]

[123] Watts v. Indiana, 69 S. Ct. 1347 (1949); Turner v. Pennsylvania, 69 S. Ct. 1352 (1949); Harris v. South Carolina, 69 S. Ct. 1354 (1949).

[124] Watts v. Indiana, 69 S. Ct. 1347, 1357 (1949). [125] Ibid., at 1358. [126] Ibid., at 1350.

A federal procedure decision which will have almost its only impact in the District of Columbia involved facts odd enough to make it worth recitation.[127] The defendant, Frazier, was charged with violating the Narcotics Act, a statute administered by the Treasury Department. He was tried by a jury in the District of Columbia which consisted entirely of government employees, including one who was an employee of the Treasury Department and another whose wife was employed there. Defendant claimed the lack of an impartial jury as required by the Sixth Amendment.

Justice Rutledge surprisingly held that Frazier had nothing of which to complain. The "government quality" of the jury had in part been created by his own challenges to some nongovernment employees on the panel, a fact which Justice Rutledge stressed. But the defendant's use of his challenges is entirely his own prerogative, and he should scarcely be required to use it to take government employees off the panel if they should not have been there in such numbers in the first place.[128] Although it has long been recognized by statute and decision that government employees should serve as jurors, it is surprising the Court should not feel that 12 out of 12 are too many. Excerpts from a paragraph of Justice Jackson's dissent, joined by Justices Frankfurter, Douglas, and Murphy, are so forceful that they are appended in a note.[129]

Four search and seizure cases give evidence of the renewed attention being given that subject. In the most important of them, *Wolf v. Colorado*,[130] the majority, like an army on parade, marched impressively up the field and then came back again to where they had started. If the figure may be pursued, the parade was magnificent, but the enemy remained unscathed.

[127] Frazier v. United States, 335 U.S. 497 (1948).

[128] Justice Jackson asserted in dissent that the reason for the large number of government employees on District of Columbia juries is that the court dismisses those who do not wish to serve. Compensation for jurors is $4.00 a day, except that government employees get their regular salaries from their agencies. They are thus the only group of employed persons eligible for jury service who do not have something to gain by taking advantage of the opportunity to avoid jury service, since the $4.00 is obviously not compensatory for most other persons.

[129] "This criminal trial was an adversary proceeding, with the government both an actual and nominal litigant. It was the patron and benefactor of the whole jury, plus one juror's wife for good measure. At the same time that it made its plea to them to convict, it had the upper hand of every one of them in matters such as pay and promotion. Of late years, the Government is using its power as never before to pry into their lives and thoughts upon the slightest suspicion of less than complete trustworthiness. It demands not only probity but unquestioning ideological loyalty. . . . Even if we have no reason to believe that an acquitting juror would be subjected to embarrassments or reprisals, we cannot expect every clerk and messenger in the great bureaucracy to feel so secure as to put his dependence on the Government wholly out of mind." 335 U.S. 497, 514–15 (1948).

[130] 69 S. Ct. 1359 (1949).

In the *Wolf* case, the defendant had been charged with a criminal offense in the courts of Colorado, where evidence obtained by an alleged unlawful search and seizure was admitted against him. The issues before the Court were two: (1) Is the Fourth Amendment, through the Fourteenth Amendment, a limitation on the states as well as on the federal government? (2) If so, is the federal rule declared in *Weeks v. United States*,[131] that wrongfully seized evidence may not be admitted, also a limitation on the states?

What the Court decided on the first point is a little elusive. In the view of the Court majority, for whom Justice Frankfurter spoke, no one of the amendments in the Bill of Rights is, as such, made applicable to the states by the 14th Amendment. Rather, so many of the Bill of Rights conceptions are made applicable to the states as are "implicit in the concept of ordered liberty."[132] This does not mean that one may simply label a right "implicit" or not. Instead, under this majority view, a single principle of the Bill of Rights may be obligatory on the states in some situations and not in others. For example, the right to counsel is "implicit in the concept of ordered liberty" in capital cases,[133] but is usually not "implicit" in larceny cases.[134]

In the *Wolf* case, the Court split the search and seizure protection and withheld one part. *Something* of the search and seizure conception is declared to be a limitation on the states. Justice Frankfurter called it "The security of one's privacy against arbitrary intrusion by the police."[135]

On the other hand, it was held that evidence illegally seized by a state could be admitted at trial although under the federal rule such evidence would be inadmissible. Justice Frankfurter held that the inadmissibility aspect of the Fourth Amendment,[136] though "we stoutly adhere to it" for the federal system, was not so important that it must also be applied to the states. The primary element inducing his conclusion was that thirty states do not now apply the *Weeks* rule, and that therefore the failure to apply it was not sufficiently abritrary or unjust to require federal correction.

This result leaves the question of how the prohibition against illegal

[131] 232 U.S. 383 (1914). [132] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[133] Powell v. Alabama, 287 U.S. 45 (1932).

[134] Betts v. Brady, 316 U.S. 455 (1942). In two cases this year the Court found that petitioners had been denied due process by trials without counsel in non-capital cases. Uveges v. Pennsylvania, 335 U.S. 437 (1949); Gibbs v. Burke, 69 S. Ct. 1247 (1949).

[135] 69 S. Ct. 1359, 1361 (1949).

[136] The inadmissibility rule, of course, is based upon both the Fourth Amendment and the self-incrimination safeguards of the Fifth Amendment.

searches and seizures is to be enforced against the states if the police are to be permitted to use evidence which is the fruit of illegality. The Court pointed out that persons so victimized may resort "to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford."[137]

Justices Douglas, Murphy, and Rutledge dissented. To Justice Murphy, author of the principal dissent, remand to "private action" and "internal discipline" was tantamount to holding that there was no federal limitation at all on the rights of states to make searches and seizures. The Murphy opinion, from the standpoint of good clear prose and reserved strength of expression, is one of the rare great documents to emerge from the judicial process, and deserves reading in full. The Murphy thesis was that of the *Weeks* case—if wrongfully seized documents can be used as evidence, the Fourth Amendment "might as well be stricken from the Constitution."[138] He derided the Court's alternatives to the rule of exclusion of evidence, saying, "There is but one alternative to the rule of exclusion. That is no sanction at all."[139]

The other search and seizure cases were less impressive. *Brinegar v. United States*[140] followed the rule of *Carroll v. United States*,[141] permitting search without a warrant upon a showing of very probable cause that a crime was being committed and that the person searched was escaping in an automobile. In *McDonald v. United States*[142] the Court held a search illegal in which the police without a warrant sneaked into a house through a window, peered at a tenant through a transom, saw him doing something illegal, and then claimed the right to seize the implements of his misdeed because they had actually seen them. The defendant had been under observation for two months, and no reason for proceeding without a warrant was even suggested. The most interesting aspect of the *Brinegar* and *McDonald* cases was the view expressed by Justice Jackson that the interpretation of the Fourth Amendment ought to vary with the offense charged. McDonald was charged with being in the numbers racket, Brinegar with bootlegging. Both of these offenses seemed unimportant to Justice Jackson, who observed, "Whether there is reasonable necessity for a search without waiting to obtain a warrant certainly depends somewhat upon the gravity of the offense thought to be in progress as well as the hazards of the method of attempting to reach it."[143]

[137] 69 S. Ct. 1359, 1369 (1949).
[138] Weeks v. United States, 232 U.S. 383, 393 (1914).
[139] 69 S. Ct. 1359, 1369 (1949).
[140] 69 S. Ct. 1302 (1949).
[141] 267 U.S. 132 (1925).
[142] 335 U.S. 451 (1948).
[143] Ibid., at 459.

A summary of the positions of the Justices in the nonunanimous civil rights cases follows. As always, such data must be read with the greatest of caution, for in some respects it is misleading.[144] Cases are classified by result, without regard to whether a particular Justice may have been preoccupied with procedural issues. The cases collected on the happenstance of appearing in the same term may bulk overlarge in some areas and omit others. For example the record of Chief Justice Vinson, who is more disturbed about racial discriminations than he is about trial abuses, is somewhat distorted for this year, in which there were no racial discrimination cases but several fair trial problems.

Moreover, the summary makes no allowance for extremeness of position. Thus Justice Black is predominantly on the "pro civil rights" side of the table despite the fact that his lone position on searches and seizures in *Wolf v. Colorado* may well be the most restrictive interpretation of the Fourth Amendment by any Justice in the Court's history. Justice Frankfurter is listed at the middle of the group, although the views expressed by him in his lone opinion in *Kovacs v. Cooper* represent the most basic hostility, not to freedom of speech but to judicial protection of freedom of speech, of any member on the Court.[145] Justice Reed is listed as being least persuaded by claims of civil rights; yet he apparently rejects the extreme Frankfurter position in the *Kovacs* case, and wrote a unanimous opinion upholding the right to counsel in a borderline situation.[146] Finally, a careful note should be made that allocation of a digit to one side or another of the table is not an expression of the wisdom or legal rightness of the position.[147]

With all these and other qualifications, the list is nonetheless of some value. If a given Justice's decisions put him preponderantly in one column

[144] The principal popularizer of the "statistical method" of approaching Supreme Court decisions is Professor C. Herman Pritchett. See, for example, his book, The Roosevelt Court (1948). But Professor Pritchett himself is far more reserved concerning the merits of the method than some who have toyed with it. I have expressed my own strong doubts as to the usefulness of the device in a review of the Pritchett book, 34 Iowa L. Rev. 143 (1948); see Yarmolinsky, 16 Univ. Chi. L. Rev. 598 (1949), also reviewing Professor Pritchett's book.

[145] Justice Frankfurter elaborated at some length his view that the well-known footnote four of United States v. Carolene Products Co., 304 U.S. 144, 152 (1938), and the numerous cases following it had *not* put the civil rights in a "preferred position," protected by a "presumption of unconstitutionality."

[146] Gibbs v. Burke, 69 S. Ct. 1247 (1949).

[147] Since one tends to measure "rightness" by his own convictions, the writer notes that he thought the claim of a violated civil right unsound in four of the cases in the group of eighteen cited note 148 infra. The four are Brinegar v. United States (search of automobile), Hirota v. United States (review of war crimes), Kovacs v. Cooper (suppressing of sound trucks), and Wade v. Hunter (question of double jeopardy in court martial).

or the other, then the figures contain a clue or hint as to his basic attitudes about civil rights.

There were eighteen divided civil rights cases at the 1948 term.[148] There were in addition four civil rights cases this year in which the Court was unanimous, twice upholding the claim and twice disallowing it.[149]

TABLE 3

DISTRIBUTION OF VOTES IN NONUNANIMOUS CIVIL RIGHTS CASES

JUSTICE	IN SUPPORT OF THE CLAIMED RIGHT				IN DENIAL OF THE CLAIMED RIGHT			
	1946	1947	1948	TOTAL	1946	1947	1948	TOTAL
Vinson	0	6	2	8	12	21	16	49
Black	8	19	12	39	4	7	6	17
Reed	2	4	2	8	10	23	16	49
Frankfurter	2	12	9	23	10	15	9	34
Douglas	8	23	16	47	4	4	2	10
Murphy	10	25	18	53	1	2	0	3
Jackson	2	7	5	14	9	20	12	41
Rutledge	11	26	15	52	1	1	2	4
Burton	3	6	1	10	9	21	17	47

With all the limitations of the case-counting approach in this area, it does at least establish clearly, for example, that Justices Rutledge and Murphy on the one hand, and Justice Reed and Chief Justice Vinson on the other, have wholly different schemes of values in respect to civil liberty.

IV. LAWYER'S LAW

FEDERAL JURISDICTION

a) *Certiorari Jurisdiction*

In last year's article it was suggested that the published rules and statements concerning certiorari jurisdiction are rapidly on their way to be-

[148] Brinegar v. United States, 69 S. Ct. 1302 (1949); Fisher v. Pace, 334 U.S. 827 (1948); Frazier v. United States, 335 U.S. 497 (1948); Harris v. South Carolina, 69 S. Ct. 1354 (1949); Hirota v. MacArthur, 335 U.S. 906 (1948); Humphrey v. Smith, 336 U.S. 695 (1949); Klapprott v. United States, 335 U.S. 601 (1949); Kovacs v. Cooper, 336 U.S. 77 (1949); Lustig v. United States, 69 S. Ct. 1372 (1949); McDonald v. United States, 335 U.S. 451 (1948); Terminiello v. Chicago, 69 S. Ct. 894 (1949); Turner v. Pennsylvania, 69 S. Ct. 1352 (1949); United States ex rel. Johnson v. Shaughnessy, 69 S. Ct. 921 (1949); Uveges v. Pennsylvania, 335 U.S. 437 (1948); Wade v. Hunter, 336 U.S. 684 (1949); Watts v. Indiana, 69 S. Ct. 1357 (1949); Wolf v. Colorado, 69 S. Ct. 1359 (1949). In view of the Chief Justice's position in the Terminiello case, in which his dissent was solely on procedural grounds and in which he noted that if he had reached the issue considered by the majority, he would have concurred, he is listed as supporting the claimed right in that case.

[149] Gibbs v. Burke, 69 S. Ct. 1247 (1949); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); United States v. Wallace & Tiernan Co., 336 U.S. 793 (1949); Young v. Ragen, 69 S. Ct. 1073 (1949).

coming legal fictions.[130] At least some expressions this year add support to this view.

The three rules regarding certiorari which in fact seem to be in process of change are (1) that certiorari will be granted, among other circumstances, where an important public question is raised; (2) that certiorari will be granted where four Justices so vote; and (3) that the denial of certiorari is not even a tacit affirmance, and expresses no judgment one way or the other on the merits.[131]

The article on the 1947 term collected a number of certioraris denied that year on which a reasonable person might have supposed that the writ would be granted on the basis of the first proposition above. During the 1948 term, however, the Court seems to have been unduly generous, under this rule, in one or two of its grants of the writ.[132]

The term witnessed an attack by Justice Frankfurter on the second proposition above—the "rule of four." When the bulk of the Court's jurisdiction was made discretionary by Congress in 1925, it was on the promise explicitly made for the Court by its representative at the Congressional hearings that certiorari would be granted on the vote of four Justices.[133] This year Justice Frankfurter declared that he would not vote on the merits of the Federal Employers' Liability Act cases even though certiorari had been granted under the "rule of four." He believes that the Court should not spend its time on such cases, which usually involve problems of the operation of civil juries under the Seventh Amendment. Nevertheless a substantial number of certioraris are granted in these cases. In *Wilkerson v. McCarthy*, Justice Frankfurter detailed his reasons for believing

[130] 1947 Term Article, at 34-35.

[131] A leading work analyzing certiorari practice is Boskey, Mechanics of the Supreme Court's Certiorari Jurisdiction, 46 Col. L. Rev. 255 (1946).

[132] It is so frequently difficult to understand dismissal orders in appeal cases because of the widely variant present practice in respect to them. For examples, in Hall v. Virginia, 335 U.S. 875 (1948), the appeal was dismissed with no reason or citation given, although Justices Douglas and Murphy felt strongly enough to the contrary to note dissents. Hodge v. Tulsa County Elec. Bd., 335 U.S. 889 (1948), was dismissed, a reason being given that the case was moot, supported by citations. In Georgia R. Co. v. Musgrove, 335 U.S. 900 (1949), an appeal was dismissed for the stated reason that there was an adequate state ground for the judgment below. Justice Jackson dissented, and no cases were cited. In Superior Court of California v. Lillefloren, 335 U.S. 811 (1948), an appeal was dismissed for the same reason, this time with citations.

In Michelson v. United States, 335 U.S. 469, 474 n. 5 (1948), Justice Jackson, author of the opinion of the Court, noted his own doubts as to whether certiorari should have been granted at all. Fisher v. Pace, 336 U.S. 155 (1949), a contempt of court case turning entirely upon unique facts and in which the judgment either way was necessarily very close, exemplifies the type of case in which it is hard to understand why certiorari should have been granted.

[133] See Boskey, op. cit. supra note 182, at 257; Burton, Judging Is Also Administration, 21 Temple L.Q. 77, 84 (1947).

that these cases were cluttering the docket of the Court and concluded, "I would, therefore, dismiss the petition as having been improvidently granted. Since, however, that is not to be done, I too have been obliged to recanvass the record . . ."[134] and he thereupon recorded his position on the merits. In *Hill v. Atlantic Coast Line R.R.*,[135] an FELA case, certiorari was granted and the judgment below reversed without argument in a per curiam decision. Justice Frankfurter noted that the petition itself should not be granted, and apparently did not participate on the merits. In *Reynolds v. Atlantic Coast Line R.R.*,[136] a similar FELA case, he joined in the Court's opinion on the merits only because the case could be disposed of on the pleadings and did not require him to read a record.

These three cases seem to amount to an expression by Justice Frankfurter of a policy not to participate in FELA cases on the merits where a record is involved. If four Justices were to join the Frankfurter position, cases would presumably be put on the docket by four Justices and taken off by the other five as a matter of routine. To this extent the "rule of four" is vitiated in these cases, for it is simply a form to grant a certiorari if the case is not then to be considered. While it may be an unsound policy to leave to four Justices the authority to determine what cases the Court will hear, it is doubtful that Congress would have granted the discretionary jurisdiction on any other basis.

It was suggested last year that denial of certiorari is rather frequently coming to mean tacit approval of the opinion below. That at least some of the Justices themselves have this view was indicated in the dissent in *Christoffel v. United States*.[137] The conviction of Christoffel of perjury before a Congressional Committee was set aside by a majority of the Court on the ground that it did not appear that a quorum of the Committee before which he had testified had been present at the time of the alleged perjury. Justice Jackson, joined by Justices Reed, Burton, and Chief Justice Vinson, dissented in part on the ground that the identical issue had been raised in a previous perjury case on which certiorari had been denied. Justice Jackson noted that the earlier denial "of course does not imply approval of the law announced below,"[138] but nonetheless he did stress the denial in the previous case at some length. In his oral delivery of his opinion, this was perhaps the point most vigorously made. In the written opinion he concluded, "I do not see how the Court can justify such discrimina-

[134] Wilkerson v. McCarthy, 336 U.S. 53, 68 (1949).

[135] 336 U.S. 911 (1949).

[136] 336 U.S. 207 (1949).

[137] 69 S. Ct. 1447 (1949).

[138] Ibid., at 1452 n. 4.

tion."[159] The whole tone of this portion of his opinion is that the action of the Court in the two cases is somehow incompatible, which is true only if denial of certiorari is something other than totally colorless, conveying no attitude whatsoever toward the case denied review. The discussion heightens the impression that, regardless of the formula, denial of certiorari in at least some cases is coming to be an indication that the decision below was correct.

b) District of Columbia—Diversity Jurisdiction

In *National Mutual Insurance Co. v. Tidewater Transfer Co.*,[160] the Court passed upon the validity of the 1940 Act permitting District of Columbia residents to have access to the federal diversity jurisdiction. That jurisdiction is restricted by Article III of the Constitution to citizens of different "states," and it had early been held by Marshall that the District of Columbia and the territories were not "states" and that legislation passed under that clause did not give their citizens access to federal courts. In 1940, Congress attempted to undo the Marshall result by passing an explicit authorizing act which rested primarily on Article I of the Constitution rather than Article III; relying on its power to make laws "necessary and proper" for the District of Columbia and the territories.

Justice Jackson, joined by Justices Black and Burton, declared the statute invalid if it rested on a theory that "states" in Article III included the District of Columbia, but that it was valid as an exertion of the power under Article I. Justices Rutledge and Murphy thought it invalid as an exercise of Article I power, but valid under Article III. Justices Frankfurter, Reed, Vinson, and Douglas thought it invalid under both. Thus, although a majority of the Court thought the statute invalid on each theory, the combination of theories resulted in its being upheld by a vote of five to four. There are times when the whole is greater than the sum of its parts.

Jackson contended that under the various grants of power in Article I, Congress was empowered to add to the jurisdiction of the district courts. It had previously been generally thought that Article III was exclusive, and that, while Congress could subtract from the jurisdiction of the lower courts, or indeed abolish them, it could not add to their jurisdiction.[161] That view still prevails as a result of the rigorous adherence to it of six of the Justices in this case. Under the Jackson view, the whole unintelligible mass of doctrine concerning the relations of "legislative" and "constitu-

[159] Ibid., at 1453 n. 4.

[160] 69 S. Ct. 1173 (1949).

[161] The opinions of Justices Rutledge and Frankfurter deal thoroughly with this question. Ibid., at 1184, 1195.

tional" courts would have been taken out of the District of Columbia cubby hole in which it primarily resides and would have been inflicted on the district courts in the forty-eight states.[162] This is avoided by the other positions taken.

The best of the argument lay with Justice Frankfurter when he contended in his dissent, "A decent respect for unbroken history since the country's foundation, for contemporaneous interpretation by those best qualified to make it, for the capacity of the distinguished lawyers among the Framers to express themselves with precision when dealing with technical matters, unite to admonish against disregarding the explicit language of Article III. . . ."[163]

It is usually thought that Chief Justice Marshall performed an almost senseless act when he originally interpreted "state" so narrowly as to exclude the District, and Justice Rutledge treats his opinion as one in which "the master hand . . . faltered." But Marshall, for all the aggressiveness of his nationalism, was careful not to give needless affront to the prejudices of his time when the matter involved was of no great importance, as this one was and is not. There was once great local jealousy against the District of Columbia. In the Virginia ratifying Convention on the Constitution, which Marshall attended, that attitude was expressed strongly. Such men as Patrick Henry, in their opposition to the Constitution, vigorously argued that the power over the "ten miles square" might be used to create an oligarchy which would reach out and enjoy special privileges in the rest of the country in derogation of the laws of the states. Those fears were specifically answered by categorical pledges from the Federalists in that convention that the District power would be restricted to the District, and particularly that no corporations chartered there would be given special privileges elsewhere.[164]

In view of that peculiar attitude toward the District which was so prominently in public attention when the Constitution was ratified, it is very possible that Marshall's hand did not falter and that he accurately reflected the convictions of the Constitutional era. The summary of other historical materials by Chief Justice Vinson shows that the jealousies of the 18th century toward the federal judiciary resulted in deliberately making Article III exclusive.

[162] Justice Rutledge discusses this aspect of the problem at some length. Ibid., at 1185 n. 7 and text following.

[163] Ibid., at 1199.

[164] References to Elliot's Debates on this point are collected in Frank, Review of Curtis, Lions Under the Throne, and McCune, The Nine Young Men, 96 U. of Pa. L. Rev. 597, 600 (1948).

c) Federal and State Courts

In addition to the usual run of *Erie v. Tompkins* cases, one of which removed some doubts as to the meaning of *Angel v. Bullington*,[165] there were two cases of considerable importance on the relation of state and federal courts. *Stainback v. Mo Hock Ke Lok Po*[166] was probably brought up for review to consider a basic problem of civil rights; but it served to settle an important matter of procedure. The proceedings were brought in the federal court in Hawaii, rather than the territorial court, to challenge the validity of a territorial law precluding the operation of foreign language schools there. In addition to other procedural matters of less general significance, the Court in an opinion by Justice Reed held that, as a matter of equitable discretion, the suit should have been remanded by the federal to the territorial courts. The language used is equally applicable to a great variety of important suits anywhere in the United States.

This is but the most recent of a long line of cases limiting federal jurisdiction in injunction suits by the device of equity's discretion. Perhaps no aspect of federal-state court relations has been more unsatisfactory than federal intervention to enjoin state administrative or legislative actions on ground of unconstitutionality. The *Stainback* opinion went considerably farther than any previous case to end that practice, holding that:

> where equitable interference with state and territorial acts is sought in federal courts, judicial consideration of acts of importance primarily to the people of a state or territory should, as a matter of discretion, be left by the federal courts to the courts of the legislating authority unless exceptional circumstances command a different course.[167]

The references to "acts of importance primarily to the people of a state" and "exceptional circumstances" leave considerable leeway for the future, but the passage is very broad nonetheless.

The policy of giving the states first try at questions arising from their own laws was very carefully limited by the Court in *Propper v. Clark*[168] to federal constitutional cases. This was an action brought in a federal court by the Alien Property Custodian. His rights in this complicated proceeding were substantially dependent on New York law. Justice Frankfurter expressed the view that the case should be remanded to the district court so that declaratory judgment proceedings might be instituted

[165] 330 U.S. 183 (1947). Woods v. Interstate Realty Co., 69 S. Ct. 1235 (1949), holds that the two grounds of decision in the Angel case are equally effective precedent, and that, in substance, under this application of the Erie rule, state legislatures may limit the jurisdiction of federal courts in diversity cases by limiting the jurisdiction of their own courts. For a brief criticism of Angel v. Bullington on this point, see the 1946 Term Article, at 32–33.

[166] 336 U.S. 368 (1949). [167] Ibid., at 383, 384. [168] 69 S. Ct. 1333 (1949).

in New York state courts to obtain a declaration of the New York law.[169] Justice Reed in the opinion of the Court met this suggestion with a flat rejection, holding that such declaratory judgment proceedings would not be used except where necessary to avoid possible unnecessary decision of a constitutional question by the federal court. The device, he said, "is not to be used to impede the normal course of action where federal courts have been granted jurisdiction of the controversy."[170] It is fortunate that the matter was thus resolved, for the device of holding litigation in federal courts pending proceedings elsewhere is likely to make the federal litigation interminable.

d) Sovereign Immunity

The old tune of sovereign immunity was played again in *Larson v. Domestic & Foreign Commerce Corp.*,[171] and when it was over the sovereign had somewhat more immunity than he had had before. The suit was brought against the War Assets Administrator to enjoin him from delivering to anyone but the plaintiff, coal which the plaintiff alleged had been sold to him. The case was thus in effect an action for specific performance. The Court in an opinion by the Chief Justice, recognized two legitimate types of injunction suits against government officials: where their acts were beyond the powers given them by statute, and where the statute or order under which they proceeded was unconstitutional. The Court rejected a third theory, that where an officer held property the "title" of which was in another, the true holder of the "title" might sue to recover the property. This required a very narrow construction of *United States v. Lee*,[172] the leading case in the field, and the overruling of *Goltra v. Weeks*.[173] Justice Frankfurter, in a dissent joined by Justice Burton, digs into the subject with enormous thoroughness, and the opinion of the Court as well as the dissent make this the leading, as well as the most recent, exposition of the jurisdictional law applicable when the government holds property claimed by another. If there is any modern development to modify sovereign immunity, the majority opinion sets the crusade back considerably.[174]

[169] Justice Frankfurter advanced a similar suggestion in Comm'r v. Estate of Church, 335 U.S. 632, 674 (1949).

[170] 69 S. Ct. 1333, 1344 (1949).

[171] 69 S. Ct. 1457 (1949).

[172] 106 U.S. 196 (1882)

[173] 271 U.S. 536 (1926).

[174] A recent scholarly plea for limitation of the immunity is found in Block, Suits against Government Officers and the Sovereign Immunity Doctrine, 59 Harv. L. Rev. 1060 (1946).

V. The Institution and Its Justices

THE WORK OF THE INSTITUTION

At the 1948 term, the number of cases decided by opinion, including per curiams but excluding simple companion cases, was 122. At the preceding term the number was 119. This is a far cry from the usual 200 or so cases a year which made up the docket before the war.

As was observed here last year, this smaller docket is the product of a number of factors, such as the elimination of many constitutional issues once in controversy, the *Erie v. Tompkins* rule eliminating diversity cases, and the *Dobson* rule eliminating review of many tax cases. Compensating to a small extent for these factors are the increased number of civil liberties cases.

Perhaps partly a result of and perhaps partly a cause of the small docket is a shift in the manner in which the Court is doing its work. While

TABLE 4

DISTRIBUTION OF MAJORITY OPINIONS

Vinson	9	Murphy	10
Black	19	Jackson	10
Reed	15	Rutledge	10
Frankfurter	12	Burton	7
Douglas	19	Per cur.	11

the number of cases being decided is about 60 per cent of pre-war normal, the number of words being written is at least as great as ever, and this year the Court stayed in session almost a month longer than was once usual.[175] Presumably, some of the present Court believe that more extensive discussions are desirable than was formerly the custom. The Court also appears to be turning more and more toward individual statements by each Justice, thus subordinating the role of "the opinion of the Court," and, indeed, rather frequently obliterating it.[176]

None of these generalities applies to the entire Court. The Chief Justice, for example, almost never writes separately, and Justices Black and

[175] The Court adjourned this year on June 27. The latest date of any adjournment from 1931 to 1940 was June 5 at the October 1948 term. That year the Court disposed of 247 cases on the merits, 307 U.S. 683 (1939), more than twice as many as this year.

[176] There was no "opinion of the Court" to which a majority subscribed without additional expression in any of the following cases: Comm'r v. Culbertson, 69 S. Ct. 1210 (1949); Harris v. South Carolina, 69 S. Ct. 1354 (1949); Interstate Oil Pipeline Co. v. Stone, 69 S. Ct. 1264 (1949); Klapprott v. United States, 335 U.S. 601 (1949); Kovacs v. Cooper, 336 U.S. 77 (1949); Lustig v. United States, 69 S. Ct. 1372 (1949); McDonald v. United States, 335 U.S. 451 (1948); Nat. Mut. Ins. Co. v. Tidewater, 69 S. Ct. 1173 (1949); United States v. Penn Foundry, 69 S. Ct. 1009 (1949); Turner v. Pennsylvania, 69 S. Ct. 1352 (1949); Watts v. Indiana, 69 S. Ct. 1347 (1949); Wilkerson v. McCarthy, 336 U.S. 53 (1949). This is approximately ten per cent of the cases.

Douglas are approximately as concise as they were ten years ago. But the description is generally accurate.

The distribution of majority opinions among the Justices was as shown in Table 4.[177]

At the 1946 term, Justices Frankfurter and Jackson prevailed in a considerably larger number of important cases than did Justices Black, Douglas, Murphy, and Rutledge. At the 1947 term, that balance shifted markedly, and in 1948, it stayed approximately as it was the year before. At all three terms, Justices Reed, Burton, and the Chief Justice have been consistently of the majority. For each of the past two years, Justice Jackson has been the most frequent dissenter in important cases.

The degree of prevalence of the views of particular Justices can be measured by concentrating on the most important of the decisions, and for this purpose I have arbitrarily chosen two groups of cases which seemed to me to have the most important consequences to society. The first group consists of the five cases which seem the most significant of the year.[178] The second group of twenty-four are definitely less important, but are not routine.[179] The data in Table 5 are taken from these two groups. Disquali-

[177] The text table is the writer's count. Data in the Washington Post (July 5, 1949), which does not eliminate companion cases of an extremely simple sort, are as shown in the accompanying tabulation.

	Majority	Conc.	Dis.	Other
Vinson	10	0	4	0
Black	12	3	7	0
Reed	16	0	8	0
Frankfurter	14	11	20	0
Douglas	20	5	12	1
Murphy	9	1	9	0
Jackson	10	4	17	3
Rutledge	9	6	8	0
Burton	7	9	5	0

The imbalance of the distribution among the Justices was more noticeable during the term than at its somewhat protracted end. Justice Frankfurter, for example, handed down seven of his twelve opinions at the last two sessions of the Court in June. On March 28 the distribution of the majority opinions was as follows:

Vinson	2	Murphy	4
Black	13	Jackson	5
Reed	8	Rutledge	2
Frankfurter	3	Burton	3
Douglas	10	Per cur.	8

[178] Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); International Union, UAW v. WERB, 336 U.S. 245 (1949); Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949); Terminiello v. Chicago, 69 S. Ct. 894 (1949); Wolf v. Colorado, 69 S. Ct. 1359 (1949).

[179] Algoma Plywood Co. v. WERB, 336 U.S. 301 (1949); Comm'r v. Estate of Church, 335 U.S. 632 (1949); Fed. Power Comm'n v. Panhandle Eastern Pipeline Co., 69 S. Ct. 1251 (1949); Frazier v. United States, 335 U.S. 497 (1949); Hirota v. MacArthur, 69 S. Ct. 197, 1238 (1948);

fications give some Justices less than a total of twenty-nine.

The distribution of agreements among the Justices in these 29 cases, whether in majority or dissent, is shown in Table 6.

TABLE 5

VOTING DISTRIBUTION

JUSTICE	MAJORITY VOTES			DISSENTING VOTES		
	Major	Important	Total	Major	Important	Total
Vinson	4	18	22	1	6	7
Black	4	17	21	1	7	8
Reed	5	19	24	0	5	5
Frankfurter	4	15	19	1	9	10
Douglas	3	16	19	2	8	10
Murphy	3	16	19	2	7	9
Jackson	4	13	17	1	10	11
Rutledge	3	17	20	2	6	8
Burton	4	17	21	1	7	8

TABLE 6

AGREEMENTS AMONG JUSTICES IN MAJOR AND IMPORTANT CASES

	Vinson	Black	Reed	Frankfurter	Douglas	Murphy	Jackson	Rutledge	Burton
Vinson	.....	14	24	19	14	12	25	13	24
Black	14	.....	17	12	25	20	10	20	13
Reed	24	17	.....	18	15	15	20	16	21
Frankfurter	19	12	18	.....	10	12	23	13	23
Douglas	14	25	15	10	.....	20	12	18	13
Murphy	12	20	15	12	20	.....	10	24	11
Jackson	25	10	20	23	12	10	.....	9	24
Rutledge	13	20	16	13	18	24	9	.....	12
Burton	24	13	21	23	13	11	24	12	.....

At the 1948 term, the pattern of agreements among the Justices remained much as it had been before. The most marked change was the great increase in agreements at this term between Chief Justice Vinson

Hood & Sons v. DuMond, 336 U.S. 525 (1949); Klapprott v. United States, 335 U.S. 601 (1949); Kovacs v. Cooper, 336 U.S. 77 (1949); Larson v. Domestic & Foreign Corp., 69 S. Ct. 1457 (1949); McComb v. Jacksonville Paper Co., 336 U.S. 187 (1949); MacDougal v. Green, 335 U.S. 281 (1948); Michelson v. United States, 335 U.S. 469 (1948); NLRB v. Stowe Spinning Co., 336 U.S. 226 (1949); Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368 (1949); Standard Oil Co. v. United States, 69 S. Ct. 1051 (1949); United States v. Corn, 69 S. Ct. 1086 (1949); United States v. ICC, 69 S. Ct. 1410 (1949); United States v. Nat. City Lines, 69 S. Ct. 955 (1949); Upshaw v. United States, 335 U.S. 410 (1948); Urie v. Thompson, 69 S. Ct. 1018 (1949); Vermilya-Brown Co. v. Connell, 335 U.S. 377 (1948); Wheeling Steel Corp. v. Glander, 69 S. Ct. 1291 (1949); Williams v. New York, 69 S. Ct. 1079 (1949); Young v. Ragen, 69 S. Ct. 1073 (1949).

and Justice Jackson. Of the thirty-six possible combinations of nine Justices into pairs, Chief Justice Vinson and Justice Jackson, and Justices Black and Douglas were the pairs most often in agreement; while Justices Rutledge and Jackson, Justices Black and Jackson, Justices Frankfurter and Douglas, and Justices Murphy and Jackson were the pairs least often in agreement.[180]

THE WORK OF THE INDIVIDUAL JUSTICES

Chief Justice Vinson's third year on the bench found him following the lines laid down in previous years, as the work before the Court presented no particularly new problems for him. Since the Chief Justice is the one member of the Court who can regularly choose the cases on which he writes, Vinson's choice of opinions is some measure of his own interests. He is apparently particularly interested in matters of jurisdiction and procedure, evidenced by the fact that of his nine majority opinions, four were in that area.[181]

It is too soon to assess the Chief Justice in terms of his accomplishments not as a Justice but as a Chief Justice, but a tentative evaluation may be made. A Chief Justice has special opportunity to bring divergent views into harmony by virtue of his chairmanship of the conference, but if strong Justices disagree, there is substantially nothing a Chief Justice can do about it. He has the special duties both to assign opinions fairly, making the most of the special talents of each member of his bench, and to make sure that the work of the Court is rapidly and efficiently done. It now appears that Chief Justice Vinson cannot use his office to promote intellectual harmony. Perhaps no one could. In any case, as Justice Jackson observed good humoredly from the bench of the decision of the District of Columbia diversity case, the Court sometimes mounts its horse and rides off in all directions.[182] The Chief Justice's assignment of opinions has been admirable, with a fair distribution of the dull and the interesting; and if anything, he has skimped himself in the distribution of the more interesting cases. The unusual length of the term evidenced that he has not been particularly successful in getting the work done speedily. It is unlikely that he will menace Taft and Hughes as holders of the Court's laurels as the great administrators.

[180] For comparative data on the categories discussed in the foregoing section see the 1946 Term Article, at 37 et seq.; 1947 Term Article, at 45 et seq.

[181] Callaway v. Benton, 336 U.S. 132 (1949); Ex parte Collett, 69 S. Ct. 944 (1949); Kilpatrick v. Tex. & Pac. R. Co., 69 S. Ct. 953 (1949); Larson v. Domestic & Foreign Corp., 69 S. Ct. 1457 (1949); United States v. Nat. City Lines, 69 S. Ct. 955 (1949).

[182] See note 176 supra.

Justice Black, along with Justice Douglas, was as usual the author of appreciably more majority opinions than most of his brethren. The year was dramatic for Black principally because it required him to choose between two of his basic ideals—the maximum freedom of legislatures and the optimum welfare of labor. The freedom of legislatures clearly triumphed, since he wrote the two principal decisions upholding the legislative right to restrict closed shops and picketing.[183]

In his other opinions, Black's year was about as would have been expected. As has been noted above, he took the most extreme position of anyone on the Court in suggesting a sharp limitation on the meaning of the search and seizure provision of the Fourth Amendment,[184] but this general attitude toward that Amendment is not new. From the standpoint of simple exposition, his least satisfactory opinion of the year was in *United States v. Interstate Commerce Commission*.[185] From the standpoint of simplicity as well as comprehensiveness, his best opinions were the Missouri picketing case,[186] the case invalidating confessions in the absence of prompt arraignments in federal courts,[187] and *Williams v. New York*,[188] a case not discussed above. The *Williams* case holds valid a law authorizing judges to use probation reports in determining sentences despite the fact that such data are not collected in accordance with the commands of due process. The opinion considers the relevant "nonlegal" materials carefully, and is turned out with a polish that makes it one of the best opinions of the year.

The 1948 term for Justice Reed was a session of solid professional application which took him into most of the areas with which the Court deals. It was a measure of his significant role on the Court that in the most important cases of the year, he was of the majority more than often any other Justice.

Reference to a few of Reed's opinions indicates the variety of his work. He wrote the opinion of the Court in two civil rights cases upholding a right to counsel;[189] in the two cases involving application of federal labor

[183] Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949).

[184] Wolf v. Colorado, 69 S. Ct. 1359 (1949).

[185] 69 S. Ct. 1410 (1949). The Court upheld the right of the United States as a shipper to appeal to the courts from adverse decisions of the ICC. Since the United States has enormous claims on wartime overcharges, the matter is of considerable practical importance. New Republic 7 (July 11, 1949).

[186] Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).

[187] Upshaw v. United States, 335 U.S. 410 (1948).

[188] 69 S. Ct. 1074 (1949).

[189] Uveges v. Pennsylvania, 335 U.S. 437 (1949); Gibbs v. Burke, 69 S. Ct. 1247 (1949).

statutes outside the continental United States;[190] in two cases involving important matters of procedure;[191] and in a case holding that the Natural Gas Act did not give the Federal Power Commission authority to regulate sales of reserves of a producing company.[192] His unhappiest opinion of the year from the standpoint of clarity of expresssion is probably *Hynes v. Grimes Packing Co.*,[193] a case involving an Alaska fishery, which represents Reed in his occasional opaque style. One of his best written opinions was *Smith v. United States*,[194] an analysis of the problems of self-incrimination arising when a person testifies in an administrative hearing and is later prosecuted for offenses closely connected with the matter of his testimony. However, from the standpoint of amassing and clarifying large amounts of divergent materials and of making clear the real meaning of elusive precedents, the decisions dealing with the application of the Fair Labor Standards Act to Bermuda[195] and the sound truck case[196] are outstanding.

The 1948 term was outstanding for Justice Frankfurter.[197] At the preceding term, Frankfurter's energies had been taken up so largely with what at times seemed almost aimless separate opinions, that there was little of substance left.[198] At the 1948 term he again had something to say in approximately one-third of the cases, but it was more important. He wrote substantial majority opinions both in the *Standard Oil* anti-trust case,[199] and in the *Algoma Plywood* case involving the right of the states to forbid closed shops.[200] He dealt comprehensively with difficult matters for the majority in a significant admiralty case,[201] and for the dissent in the case involving extension of diversity jurisdiction to citizens of the District of Columbia.[202] His major research jobs of the year were very elaborate

[190] Vermilya-Brown Co. v. Connell, 335 U.S. 377 (1948); Foley Bros. v. Filardo, 336 U.S. 281 (1949).

[191] Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368 (1949); Propper v. Clark, 69 S. Ct. 1333 (1949).

[192] Fed. Power Comm'n v. Panhandle Eastern Pipeline Co., 69 S. Ct. 1251 (1949).

[193] 69 S. Ct. 968 (1949). [194] 69 S. Ct. 1000 (1949).

[195] Vermilya-Brown Co. v. Connell, 335 U.S. 377 (1948).

[196] Kovacs v. Cooper, 336 U.S. 77 (1949).

[197] For an extended and thoughtful analysis of Justice Frankfurter's first ten years on the bench see Jaffe, The Judicial Universe of Mr. Justice Frankfurter, 62 Harv. L. Rev. 357 (1949)

[198] The point is enlarged upon in the 1947 Term Article, at 51.

[199] Standard Oil Co. v. United States, 69 S. Ct. 1051 (1949).

[200] Algoma Plywood Co. v. WERB, 336 U.S. 301 (1949).

[201] Black Diamond S.S. Corp. v. Stewart & Sons, 336 U.S. 386 (1949).

[202] Nat. Mut. Ins. Co. v. Tidewater Co., 69 S. Ct. 1173 (1949).

studies in the sovereign immunity case,[203] and in the case dealing with state searches and seizures.[204] As has been noted, he adhered vigorously to his view that the Court should leave the states wide latitude to restrict free speech.[205]

Justice Frankfurter considers the actual decision of cases by the Supreme Court of less importance than some other Justices, carrying his doctrine of nonaction for that tribunal to the point of systematic philosophy. In a very substantial number of the cases, he would either not decide the case as a matter of some general policy or remand it for further proceedings before he would consider it ripe for decision. This year he was either alone or in a small minority in seven cases which he thought not suitable for decision.[206]

For Justice Douglas, 1948–49 may well be a year to forget. Many of his opinions must have been dull work, a job to be done.[207] The leading Douglas opinions of the year were the *Terminiello* case;[208] an important decision in the law of eminent domain;[209] an analysis of the permissible breadth of statutory injunctions;[210] his dissent in the *Standard Oil* case;[211] and his concurrence in *Hirota v. MacArthur*.[212] The *Standard* dissent is startling in both its theory and its tone. The opinion asserts that the Court "consciously pushes the oil industry" toward cartelization.[213] Since the

[203] Larson v. Domestic & Foreign Corp., 69 S. Ct. 1457 (1949).

[204] Wolf v. Colorado, 69 S. Ct. 1359 (1949).

[205] Note 145 supra.

[206] Empress Siderurgica, S.A. v. Merced County, 69 S. Ct. 995 (1949); Hill v. Atl. Coast Line R. Co., 336 U.S. 911 (1949); Hood & Sons v. DuMond, 336 U.S. 525 (1949); Nye and Nissen v. United States, 336 U.S. 613 (1949); Propper v. Clark, 69 S. Ct. 1333 (1949); Estate of Spiegel v. Comm'r, 335 U.S. 701 (1949); Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368 (1949).

[207] See, e.g., Ayrshire Collieries Corp. v. United States, 335 U.S. 573 (1949), the kind of tedious ICC review problem that eight other Justices must be delighted to see Justice Douglas write.

[208] Terminiello v. Chicago, 69 S. Ct. 894 (1949).

[209] United States v. Cors, 69 S. Ct. 1086 (1949).

[210] McComb v. Jacksonville Paper Co., 336 U.S. 187 (1949).

[211] Standard Oil Co. v. United States, 69 S. Ct. 1051 (1949).

[212] 69 S. Ct. 1238 (1948).

[213] The same underlying theory that a law must be interpreted favorably to some part of the business community if the business community is to be restrained from frustration of the object of the law had perceptible influence on the majority of the Court in Lawson v. Suwanee Fruit & S.S. Co., 336 U.S. 198 (1949), in which the government rather than the employer is held liable under the Longshoremen's Act for certain injuries to persons who have been previously injured. The Court thought that if the employer were held liable, he would not employ persons in the class involved at all, and this fear was read back into the interpretation of the act. Justice Douglas dissented.

majority of five included three Justices who have consistently upheld the anti-trust laws as strongly as Justice Douglas, it was extreme to suggest that they deliberately sought to "remake America in the image of the cartels."

Justice Douglas has consistently shown that if he has political aspirations, his opinions are unaffected by them. His independence was dramatically illustrated again this year in the *Hirota* case, where his opinion is scarcely calculated to improve his standing with some very prominent members of his own party, and where he could safely have joined in a per curiam opinion of the Court. The ultimate issue was whether an American court could review the Tokyo war crimes trials by writ of habeas corpus, and the Court summarily held that it could not. Justice Douglas concurred in the result, quoting at length, and with apparent agreement, from the opinion of Justice Pal of India, dissenting from the judgment of the Tokyo Tribunal:

> The so-called trial held according to the definition of crime *now* given by the victors obliterates the centuries of civilization which stretch between us and the summary slaying of the defeated in a war. A trial with law thus prescribed will only be a sham employment of legal process for the satisfaction of a thirst for revenge. . . . Such a trial may justly create the feeling that the setting up of a tribunal like the present is much more a political than a legal affair, an essentially political objective having been cloaked by a juridical appearance.

Douglas put his acquiescence thus: "As Justice Pal said, it [the Tribunal] did not therefore sit as a judicial tribunal. It was solely an instrument of political power."[314] Hence Douglas held the trials unreviewable not because of lack of jurisdiction in habeas corpus, but because the trials were not "legal" at all. The disposition of the defendants was thus a political question, unreviewable for that reason alone.

Justice Murphy's accomplishments at the 1948 term were the more remarkable because for the second consecutive year he was seriously hampered by ill health. Unable to hear arguments for the first part of the term, he participated in the cases of that period on the briefs. For the remainder of the term he attacked his work with renewed energy. He wrote the opinion of the Court upholding the validity of a South Carolina statute providing that undertakers might not serve as agents for insurance companies;[315] and while the point is not difficult, the opinion disposes of it with neat dispatch. An opinion interpreting the Longshoremen's Act, also on a

[314] Hirota v. MacArthur, 69 S. Ct. 1238 (1949). For a full description of a war trial in the nature of an operation of "political power" see Reel, The Case of General Yamashita (Univ. Chi. Press, 1949).

[315] Daniel v. Family Sec. Life Ins. Co., 336 U.S. 198 (1949).

small point, will serve as a model of the full exploration of the social implications of a statute in aid of its interpretation.[216]

Perhaps the most mysterious intellectual episode of the year was Justice Murphy's dissent without opinion in the *Hirota* case.[217] The dissent presumably means that he felt the petition should have been received; but it is impossible, for this commentator at least, even to conceive of a theory on which the Supreme Court might have had jurisdiction, and it would have been interesting to know what Justice Murphy had in mind. But if there was necessary lack of clarity in this dissent without opinion, there was no such confusion in Murphy's dissent with opinion in *Wolf v. Colorado*,[218] the case dealing with state searches and seizures and due process. As has been noted above, this dissent, from the standpoint both of prose and technical presentation, is one of the rare great opinions.

Without attempting to appraise the significance of Justice Murphy's work in terms of his opinions during the years that he served on the Court, his death is likely to have the most substantial consequences on the growth of public law, particularly in the field of civil rights. The balance of the court on so many matters had stood at five-to-four that the replacement of any of the Justices is a matter of utmost consequences. Justice Murphy's consistent support of the most liberal point of view both in the field of civil rights and matters of economic regulation means that the new Justice, Clark, will almost certainly move the Court in a more conservative direction.

Justice Jackson stood out at the 1948 term as the author of several significant opinions and as a writer of striking judicial prose. A major victory for views he has consistently expounded was *Hood & Sons v. DuMond*,[219] invalidating a New York order denying a license to a person seeking to gather milk and ship it out of state. The denial was held an unconstitutional burden on commerce. Justice Jackson, until the appointment of the present Chief Justice who shares his position, had been the Court's strongest exponent of the view that the Court should put its whole weight against state laws regulating commerce. In this case he carried a majority

[216] Lawson v. Suwanee Fruit & S.S. Co., 336 U.S. 198 (1949).

[217] Hirota v. MacArthur, 69 S. Ct. 1238 (1949). The petitioners applied for leave to file applications for the writ of habeas corpus in the Supreme Court. The case does not fall in any of the branches of the categories of original jurisdiction named in the Constitution, and there is no known appellate jurisdiction over the Japanese military tribunal in the Supreme Court. If the case were to be heard in any American court, it would presumably have to begin in a district court, as was done in form in Ex parte Quirin, 317 U.S. 1 (1942). Justice Douglas in his concurrence suggests this procedure.

[218] 69 S. Ct. 1359 (1949). [219] 336 U.S. 525 (1949).

of five closer to his own point of view than the Court had previously been. He also wrote an opinion giving extended and careful consideration to the role of character witnesses in federal courts.[220] Either of these would serve as his strongest opinion of the year, while his reputation is likely to gain the least from his opinion in the District of Columbia diversity jurisdiction case.[221]

As has been noted before, Justice Jackson is probably the least "legal" member of the Court—the most inclined to guide his judgments by notions of social expediency and practicality.[222] This philosophy was particularly apparent in the constitutional field this year, when he advocated different rules of reasonableness for searches and seizures depending upon the gravity of the crime charged;[223] when he advocated as an antidote to the large number of unsolved murders much wider latitude for police in attempting to get confessions, even though he conceded that his policy "largely negates the benefits of the constitutional guaranty of the right to assistance of counsel";[224] and when he advocated virtual suspension of freedom of speech when necessary to aid the police in keeping order.[225]

Justice Rutledge enjoys his work most thoroughly when he can examine a large mass of precedents from which he can skilfully choose a line to follow. Two opinions this year gave him that opportunity. One, *Oklahoma Tax Comm'n v. Texas Co.*,[226] overruled certain precedents holding that the states could not tax oil produced by the lessees of Indian lands. The other held the FELA and the Boiler Inspection Act applicable to industrial diseases.[227]

That Rutledge is not doctrinaire was illustrated by his two opinions rejecting claimed abuses of civil rights despite his obvious predilections in behalf of such claims.[228] The process of case by case determination sometimes makes it difficult for him to make up his mind at all, and he is the only member of the Court who occasionally concurs "dubitante."[229] In the

[220] Michelson v. United States, 335 U.S. 469 (1948).

[221] Nat. Mut. Ins. Co. v. Tidewater Co., 69 S. Ct. 1173 (1949).

[222] See the 1946 Term Article, at 46–47.

[223] McDonald v. United States, 335 U.S. 451 (1948); Brinegar v. United States, 69 S. Ct. 1302 (1949).

[224] See discussion note 124 supra and text.

[225] Terminiello v. Chicago, 69 S. Ct. 894 (1949).

[226] 336 U.S. 342 (1949).

[227] Urie v. Thompson, 69 S. Ct. 1018 (1949).

[228] Frazier v. United States, 335 U.S. 497 (1948); Brinegar v. United States, 69 S. Ct. 1302 (1949).

[229] See, e.g., Ry. Express Agency v. New York, 336 U.S. 106 (1949); Ex parte Collett, 335 U.S. 897 (1949), and related cases.

Hirota case, which the Court disposed of very quickly, he reserved "decision and the announcement of his vote until a later time,"[230] and at the close of the term had not yet announced it. Yet the existence of honest doubts, hesitantly resolved, should not give the impression of aimlessness. The Rutledge opinion in the *Interstate Oil Pipeline Co.*[231] case drives hard to the objective of upholding state taxing power, and a dissent in the sound truck case[232] gives a flat answer to the argument of Justice Frankfurter that the Bill of Rights and the Court do not give a "preferred position" to freedom of speech, press and assembly. On fundamentals, once his mind is made up, Justice Rutledge shows no hesitancy at all.

Justice Burton wrote seven opinions of the Court this year, more than in previous years; but the thin docket and his status as junior Justice combined to give him no cases as broadly significant as his renegotiation cases of the preceding term[233] or the *National Lead*[234] case at the 1946 term. The three leading Burton opinions were *United States v. Wittek*,[235] holding the District of Columbia Emergency Rent Act inapplicable to government owned housing; *Grand River Dam Authority v. Grand Hydro*,[236] dealing with state eminent domain proceedings and the Federal Power Act; and his dissent in *Estate of Spiegel v. Comm'r.*[237] The *Wittek* case is of considerable practical significance to government low-rent housing in the District, and is written with sensitive perception of the squalor in the alleys of the nation's capital.

The Burton opinions are usually extremely long because of the inclusion of matter which another Justice might well have thought either obvious or irrelevant. *Comm'r v. Jacobson*[238] will serve as an example. A taxpayer had issued bonds secured by a trust deed on certain property. At a time when the taxpayer was in straitened financial circumstances but was not insolvent, he bought back some of these bonds at less than their fair value. The issue in the case was whether the difference between what he paid to retire his own paper and what it was worth should be treated as taxable income. Section 22(a) of the Internal Revenue Code includes within the definition of "gross income" all "gains . . . from any source

[230] Hirota v. MacArthur, 69 S. Ct. 197, 198 (1948).

[231] Interstate Oil Pipeline Co. v. Stone, 69 S. Ct. 1264 (1949).

[232] Kovacs v. Cooper, 336 U.S. 77 (1949). Reel, op. cit. supra note 214, pays strong tribute to Justice Rutledge's hard-hitting qualities.

[233] Lichter v. United States, 334 U.S. 742 (1948).

[234] United States v. Nat. Lead Co., 332 U.S. 319 (1947).

[235] 336 U.S. 931 (1949).

[236] 335 U.S. 359 (1948).

[237] 335 U.S. 701, 708 (1949).

[238] 336 U.S. 28 (1949).

whatever." Section 22(b), however, excludes "gifts." The court below held that the benefit to the taxpayer on the bond purchases was excluded from gross income as a gift from the bondholders under Section 22(b). The leading previous case was *Helvering v. American Dental Co.*,[239] which the Tax Court and the Court of Appeals attempted to follow; and the technical issue of the case thus became whether the bond purchases were gifts within the *American Dental* rule.

Justice Burton's opinion occupies twenty-two columns of the Supreme Court Reporter. The introduction and the facts occupy seven columns and include a detailed description of the method of bond repurchase and of the circumstances of the bond issue, although the ultimate decision is not made to depend on most of the facts discussed. Four columns follow showing that the transactions create gross income within the meaning of Section 22(a), including more than two columns of quoted regulations and Code, although the applicability of Section 22(a) does not appear to have been doubted at any point below, and in any case the question is completely closed by several decisions. Note 2 sets out at length the applicable provisions of the Code and note 16 sets out at almost a column's length the comparable provisions of the Revenue Act of 1916, although no contention of any kind relates to that Act. The discussion of Section 22(b) occupies eleven columns. The *American Dental* case, the applicability of which was the only substantial point which had troubled the lower courts, is finally distinguished in one sentence in the last paragraph.

It would be misleading to leave the impression that all of Justice Burton's opinions were in the pattern just described. For example, the *Wittek*, *Grand River*, and *Spiegel* opinions mentioned above are not. What is more important, Justice Burton writes progressively fewer "*Jacobson* type" opinions as he adjusts to his judicial career.

VI. Conclusion

The life of an institution, like the life of man, knows quiet times. The 1948 term was such a time, a year with only that minimum of excitement which necessarily comes to the highest Court. With few exceptions, for the great mass of the American people life will run on about as if the Court had been in recess for a year.

Perhaps this is more than happenstance, a quirk of the cases which chanced to come up for decision. In part, of course, the decline in the docket is caused by the relaxation of regulatory activities of the government. But, and this is more important, perhaps we are witnessing the in-

[239] 318 U.S. 322 (1943).

evitable result of the twelve year policy of judicial self-denial which began as a response to events of 1936 and 1937. Years of judicial deference to the executive, to legislatures, and to administrative agencies may result finally in the abandonment of recourse to the judges. In a democracy where only judges serve for life, may it not be the ultimate triumph of the "New Deal judges" that they have shifted the real controversies of our time to agencies closer to the electorate?

BASEBALL—SPORT OR COMMERCE?*

JOHN ECKLER†

FEW BUSINESS efforts receive the public attention accorded baseball. Every rhubarb[1] is given nation-wide consideration; the calcium deposit on the heel of a quasi-peon[2] becomes the object of universal concern. The country's greatest metropolitan dailies and its smallest biweekly newspapers invariably contain sport pages which dedicate themselves to the reporting of the minutest detail of every game, trade, or development in the sport of baseball. It is familiar scheduling for radio stations to provide fifteen minutes for news of the world, followed by an equal period of baseball news. As a result of such coverage, almost everyone has a fairly intimate knowledge of baseball.

In significant contrast to this familiarity with the play of the game is the lack of familiarity with "baseball law," the self-imposed body of regulations under which "organized baseball"[3] regulates its activity. The Agreement of the National Association of Professional Baseball Leagues,[4] adopted in 1901 "to perpetuate baseball as the national game of America, and to surround it with such safeguards as will warrant absolute public confidence in its integrity and methods,"[5] together with the Major League Agreement,[6] the Major-Minor League Agreement,[7] and the rules promulgated thereunder, comprise "baseball law." Because of faithful adherence to the dictates of its own rules, "organized baseball" has had few excur-

* Subsequent to the preparation of this article it has been reported that Max Lanier and Fred Martin have decided to drop their suit against "organized baseball" which is discussed herein. N.Y. Times, § 5, p. 1, col. 2 (Aug. 28, 1949).

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[1] A term used by sports writers to describe an altercation, more or less intense in nature, between participants on a baseball field.

[2] A term used by the Court of Appeals for the Second Circuit to describe a young athlete who receives a base pay ranging from $5,000 to $100,000 for each baseball playing season of five and one-half months. Gardella v. Chandler, 172 F. 2d 402, 410 (1949).

[3] "Organized baseball" connotes the integrated system of baseball comprised of the two major leagues and the so-called minor leagues described more fully later in this paper. The players are "professional" in that they are paid salaries. Many other teams and leagues, often called "semi-professional," are composed of players some or all of whom are paid and, therefore, are in reality "professional."

[4] The Baseball Blue Book 701 et seq. (1948).

[5] National Association Agreement § 2.01 (a), The Baseball Blue Book 701 (1948).

[6] The Baseball Blue Book 501 (1948). [7] Ibid., at 601.

sions into the courts, and reported decisions are practically devoid of any reference to baseball.[8] This tranquillity, however, has been abruptly interrupted. The entire framework of the law of "organized baseball" has been challenged twice recently as illegal under the Sherman and Clayton Acts,[9] and that challenge has been given a substantial "assist" by the Court of Appeals for the Second Circuit in its remarkable decision in *Gardella v. Chandler*.[10]

I. Gardella, Martin, and Lanier

In the spring of 1946 the owners of baseball interests in Mexico undertook to hire for their teams certain players who were under contract to play for teams operating within the framework of "organized baseball." Among the players who responded to the enticing offers to go south were Daniel Gardella, an outfielder with the New York Giants, and Fred Martin and Max Lanier, pitchers with the St. Louis Cardinals. Those three players, along with several others who also "jumped" their contracts to play in Mexico, were immediately placed on a so-called "ineligible list" by Commissioner Chandler and barred for a period of five years from participation in "organized baseball" in accordance with the express provision of the Major League Rules[11] which had been specifically incorporated in each player's contract.[12] The attraction of Mexican baseball apparently proved to be more illusory than real, for most of the players who "jumped" to Mexico have not returned to that country. Gardella, Martin, and Lanier, plaintiffs in the pending actions against certain officials and teams in "organized baseball,"[13] following their abortive careers in Mexico, have returned to the United States. Since their return they have engaged in

[8] Baseball has from time to time received the attention of legal periodicals: Topkis, Monopoly in Professional Sports, 58 Yale L.J. 691 (1949); Neville, Baseball and the Antitrust Laws, 16 Fordham L. Rev. 208 (1947); Baseball and the Law—Yesterday and Today, 32 Va. L. Rev. 1164 (1946); Organized Baseball and the Law, 19 Notre Dame Lawyer 262 (1944); Johnson, Baseball Law, 73 U.S.L. Rev. 252 (1939); Organized Baseball and the Law, 46 Yale L.J. 1386 (1937).

[9] 26 Stat. 209 (1890), 15 U.S.C.A. § 1 et seq. (1941).

[10] 172 F. 2d 402 (C.A. 2d, 1949).

[11] Rule 15, Major League Agreement, The Baseball Blue Book 530 (1948).

[12] Uniform Players Contract ¶ 9(a): "The Club and the Player agree to accept, abide by and comply with all provisions of the Major and Major-Minor League Rules which concern player conduct and player-club relationships and with all decisions of the Commissioner and the President of the Club's League, pursuant thereto."

[13] Gardella has filed suit against Chandler, Commissioner; Frick and Harridge, Presidents of the National and American Leagues, respectively; Trautman, President of the National Association (minor leagues); and the New York Giants Club. Martin and Lanier are more ambitious. They have sued the same individuals, and, in addition, all sixteen clubs of the major leagues.

professional baseball,[14] but, because of their suspensions, they were for a time denied an opportunity to play on a team associated with "organized baseball." Recently,[15] "to temper justice with mercy," Commissioner Chandler "lifted" the suspension, and Gardella, Martin, and Lanier, as well as all the other players who went to Mexico, have been given permission to return to "organized baseball." The Commissioner's action does not affect any possible rights of the plaintiffs that may have accrued prior to the lifting of the suspensions, and their counsel have announced that the reinstatement will have no effect on the pending cases.

None of the players denies that in "jumping" to Mexico he breached the express terms of his contract with his club, the penalty for which was suspension from "organized baseball." They premise their action upon the allegation that the contracts are illegal because they serve to effect an illegal restraint of trade or commerce and to promote an illegal monopoly over trade or commerce in contravention of Sections 1, 2, and 3 of the Sherman Act and of Section 4 of the Clayton Act. To the extent that these sections are relevant to the pending actions, they are set out in the footnotes.[16]

The particular provision of the player's contract considered most offensive and directly calculated to effect the alleged monopoly is the so-called "reserve clause."[17] Under this provision each player gives his present club

[14] Supporting affidavits filed by Martin and Lanier with their complaint. Martin and Lanier are playing this year, the 1949 season, with the Quebec Professional League. Martin is with the Sherbrooke Club and Lanier is with the Drummondville Club earning a reported $10,000 for season's play. The Sporting News, p. 32, col. 2 (June 1, 1949). Now that their suspension has been lifted, they are back in "organized baseball."

[15] June 5, 1949.

[16] Sherman Act: "Section 1. . . . Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . .

"Section 2. . . . Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . .

"Section 3. . . . Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal." 26 Stat. 209 (1890), 15 U.S.C.A. §§ 1–3 (1941).

Clayton Act: "Section 4. . . . Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 38 Stat. 731 (1941), 15 U.S.C.A. § 15 (1941).

[17] Uniform Player's Contract ¶ 10(a).

or its assignee an option for his services for the succeeding year. Although, as Gardella quite frankly admits in his complaint, "the ultimate objective of this clause was to equalize the opportunities for each team representing a particular city or part thereof to win the pennant and thus to keep alive the interest of its supporters,"[18] it is nevertheless maintained that the universal use of contracts containing this reservation empowers "organized baseball" to control playing talent in violation of the federal mandate against restraints of trade and commerce. The plaintiffs allege that the asserted conspiracy of "organized baseball" to restrain trade and commerce among the states and its concerted action to monopolize the baseball profession has resulted in their personal damage. Martin and Lanier have stated their treble damages as being $1,000,000 and $1,500,000, respectively; Gardella places his at $300,000.

To be sure, the complaints of the plaintiffs have not been confined to a mere recital of the players' contracts and the reserve clause therein, but in considerable detail have discussed numerous provisions of the agreements comprising "baseball law," the apparent arbitrary power reposing in the Commissioner of Baseball to enforce discipline thereunder, the mechanical operations by which baseball teams move from city to city to meet their scheduled games, and particularly the more recent practice of broadcasting and televising games. The rationale of the plaintiffs' cases remains, however, that these players, because of their violation of provisions of their contracts,[19] have, under the rules of "baseball law," been deprived of an opportunity to practice their profession in "organized baseball," and that the concerted effort of "organized baseball" in the creation and enforcement of those rules is a "conspiracy in restraint of trade or commerce among the several States."[20]

II. The Federal Case

The *Gardella* case and the *Martin and Lanier* case, although not yet disposed of, have been the object of considerable judicial attention. The defendants filed a motion to dismiss the *Gardella* action on the ground that the plaintiff had failed to state a cause of action. The district court agreed[21] and granted the defendants' motion on the grounds that *Federal*

[18] Gardella complaint ¶ 53.

[19] Gardella had not signed his 1946 contract, but went off to Mexico in violation of the "reserve clause" in his 1945 contract—that he would play with the Giants or their assignee in 1946. Martin and Lanier had signed their 1946 contracts, and were playing and drawing pay thereunder. They left for Mexico on May 26, 1946, when Lanier had the enviable pitching record of five victories against no defeats.

[20] Sherman Act § 1, 26 Stat. 209 (1890), 15 U.S.C.A. § 1 (1941).

[21] Gardella v. Chandler, 79 F. Supp. 260 (N.Y., 1948).

Baseball Club of Baltimore v. National League of Professional Baseball Clubs[22] was still the law, and that the federal anti-trust laws were not applicable to the operation of "organized baseball."

The *Federal Baseball Club* decision[23] was handed down in a case which presented the only other serious challenge to the legality of the pattern established over the years by "organized baseball." There a similar raid had been made in 1914 on players under contract with clubs operating in "organized baseball" by interests in this country who were intent on creating a "third major league." When that effort proved unsuccessful, the Baltimore club of the short-lived Federal League claimed damages which it asserted were experienced because "organized baseball" had conspired to monopolize the baseball business in violation of the Sherman Act. The Court of Appeals for the District of Columbia held for the defendants.[24] The United States Supreme Court affirmed that decision. Justice Holmes, speaking for a unanimous Court, concluded that the business involved was that of giving exhibitions of baseball, "which are purely state affairs."[25] In addition, the decision held that baseball was not "commerce." The Court acknowledged that the teams played in different states and that men and equipment necessarily had to cross state lines, but said: "That to which it [interstate transportation] is incident, the exhibition, although made for money, would not be called trade or commerce in the commonly accepted use of those words. As it is put by the defendant, personal effort, not related to production, is not a subject of commerce. That which, in its consummation, is not commerce, does not become commerce among the States because the transportation that we have mentioned takes place."[26] In the twenty-seven years since that decision, the details of "baseball law" have been the subject of constant revision, but the game remains identical in all its major aspects—three strikes are still an "out," the Brooklyn Dodgers still travel to St. Louis to play the Cardinals, the clubs still carry balls and bats over state lines, and peanuts are still sold in the stands.

III. Gardella v. Chandler

It has been the general consensus of opinion of persons both in and out of baseball that the *Federal* case disposed of the issue with respect to the

[22] 259 U.S. 200 (1922). [23] Ibid.

[24] National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, 269 Fed. 681 (1920).

[25] Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, 259 U.S. 200, 208 (1922).

[26] Ibid., at 209.

character of the game, and that, since baseball was deemed not to be "interstate trade or commerce," it did not come within the ambit of the Sherman and Clayton Acts. The Court of Appeals for the Second Circuit, as recently as 1947, expressly followed the *Federal* case, but now it would seem as if "organized baseball" is to be regarded as having changed its "spots."[27] Two judges concluded that the judgment of the district court should be reversed and the cause remanded for trial on the complaint; one decided the district court's judgment should be affirmed. Each judge wrote a separate opinion.

Judge Chase reached the decision that the judgment below should be affirmed upon the grounds that (1) the *Federal* case was controlling and (2) that, even if that decision could be distinguished, Gardella had not stated a cause of action.[28] The judge found that the Holmes decision had never been reversed, that subsequent decisions had not overruled it by implication, and that the facts now before the court were indistinguishable from those considered by the Court in the *Federal* case. Commenting on the plaintiff's allegation that baseball games are now broadcast and televised, a development since the *Federal* case which proved so persuasive to the other two members of the court, Judge Chase observed that the record of the *Federal* case revealed that at the time of that decision "play-by-play" was sent over telegraph wires, and that now the same "information is sent through the air by impulses which are transformed either into words or pictures. So far as I can perceive, the difference in the method of transmission is without significance."[29]

As a second ground for his decision, Judge Chase concluded that, irrespective of the binding effect of the *Federal* case, personal services and skills are not subjects of trade or commerce within the anti-trust laws. Therefore, Gardella's allegation that the alleged conspiracy had deprived him of a right to work shoots wide of the mark.[30] The Sherman Act, this opinion holds, has never been applied unless "there was some form of restraint upon commercial competition in the marketing of goods and services in interstate commerce. . . ."[31] In that connection, Judge Chase

[27] Conley v. San Carlo Opera Co., 163 F. 2d 310 (C.C.A. 2d, 1947); Gardella v. Chandler, 172 F. 2d 310 (C.A. 2d, 1949).

[28] Gardella v. Chandler, 172 F. 2d 402, 404 (C.A. 2d, 1949).

[29] Ibid.

[30] Ibid., at 407. In this connection it may be noted that the Supreme Court has made distinctions between restraints upon interstate commerce transactions and restraints imposed in the course of interstate labor disputes. See United States v. Frankfort Distilleries, 324 U.S. 293, 297 (1945), and, at a lower court level, United Brick & Clay Workers of America v. Robinson Clay Products Co., 64 F. Supp. 872 (Ohio, 1946).

[31] Gardella v. Chandler, 172 F. 2d 402, 406 (1949).

quoted from the opinion of Justice Stone in *Apex Hosiery Co. v. Leader*:

> In the cases considered by this Court since the *Standard Oil* case in 1911 some form of restraint of commercial competition has been the *sine qua non* to the condemnation of contracts, combinations or conspiracies under the Sherman Act, and in general restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price. It is in this sense that it is said that the restraints, actual or intended, prohibited by the Sherman Act, are only those which are so substantial as to affect market prices.[32]

Judge Learned Hand took what might be considered an intermediate position between that of Judge Chase and Judge Frank. Because the complaint alleged that the sale of radio and television rights had indelibly impressed upon the sport of baseball a characteristic substantially different from that which was before the Supreme Court in the *Federal* case, Judge Hand decided that the plaintiff should have an opportunity to prove his assertions at a trial.

It may be asserted unequivocally that Judge Frank, in his opinion, did not take an intermediate position. In his first sentence he branded the Holmes decision in *Federal Baseball Club v. National League*[33] as an "impotent zombi,"[34] but concluded that nevertheless it was a decision with which the court must reckon. Thereupon, in a statement which is commendable for its candor but which, nonetheless, reflects on the judicial temperament, he stated that the *Gardella* case should be distinguished, if possible, from the *Federal* decision. The reason ascribed for this eager search for a means of placing the brand of illegality on "organized baseball" was that "we have here a monopoly which, in its effect on baseball-players like the plaintiff, possesses characteristics shockingly repugnant to moral principles that, at least since the War Between the States, have been basic in America, as shown by the Thirteenth Amendment to the Constitution, condemning 'involuntary servitude,' and by subsequent Congressional enactments on that subject."[35]

The *Federal* case had decided that the playing of a ball game was intrastate activity. For that reason, then, the players' contracts, good or bad, related to intrastate activity. The Frank opinion proceeds on the theory that if the game can be found to be interstate, then the players' contracts relate to interstate activity, and if bad (and Judge Frank has no question in his mind on that score) they violate the Sherman Act.

[32] 310 U.S. 469, 500 (1940). [33] 259 U.S. 200 (1922).

[34] 172 F. 2d 402, 409 (1949). Because of the adjective "impotent" used by the Judge we can assume he employed "zombi" to mean "the walking dead" rather than the alcoholic beverage by the same name.

[35] Ibid. Now it would seem that the "national pastime" is "un-American."

The ingredient grasped upon by Judge Frank to prove the present interstate aspect of "organized baseball" in contradistinction to the situation which existed at the time of the *Federal* case was the frequent broadcast of baseball games by radio and television. Because of this activity, the decision says, the games "are, so to speak, played interstate as well as intra-state."[36] It was conceded that the question was one of degree, but to resolve that difficult issue it was said: "However, to the question whether the difference between a difference of kind and difference of degree is itself a difference of degree or of kind, the sage answer has been given that it is a difference of degree, but a 'violent' one."[37] In final testimony to the difficulties of this tail-wags-the-dog point of view—that the sport of baseball, as it has operated for more than fifty years, is illegal because recently its games have been broadcast—stands what seems to be the fairly strained assumption upon which Judge Frank based his decision: "I think we must, for purposes of deciding the applicability of the Sherman Act, consider this case as if the only audiences for whom the games are played consist of those persons who, in other states, see, hear, or hear about, the games via television and radio."[38]

IV. Martin and Lanier v. Chandler

On June 2d of this year, the Court of Appeals for the Second Circuit, speaking through Judge Learned Hand, filed an opinion in a proceeding which it denominated a "sequel" to its decision in the *Gardella* case.[39] Motions had been filed in both the *Gardella* and *Martin and Lanier* cases for injunctions *pendente lite* to compel the defendants to remove the plaintiffs' suspensions and to reinstate them to the "eligible" list. The motions were denied by the judge of the district court on three grounds. "First, he held that the injunction would 'disturb the status quo by restoring the plaintiffs to positions which they had voluntarily resigned three years

[36] Ibid., at 411. [37] Ibid., at 412.

[38] Ibid., at 414. The thoroughness and zeal with which Judge Frank has pursued his mission is indicated by his footnote number 9a. Ibid., at 415. There he suggests an accounting technique to be used by plaintiff in the trial of his case. The "broadcast theory" will, of course, be met with the argument that while the sale of radio and television rights is a valuable asset, it in no sense controls or determines any aspect of the baseball undertaking. In anticipating that argument, the footnote seems to admit the argument's validity by calling income from that source "velvet." Nonetheless, Judge Frank would have that income compared to net profits rather than gross profits in order that it may be shown to be more than "trifling." This procedure seems to be not only bad accounting, but inconsistent with the theory of his decision. If, because of radio and television, baseball has become interstate, then certainly income from that source must be lumped with and considered in relation to income from baseball's intrastate activity. Compare Judge Hand's opinion in Martin and Lanier v. Chandler, 174 F. 2d 917 (C.A. 2d, 1949).

[39] Martin and Lanier v. Chandler, 174 F. 2d 917 (C.A. 2d, 1949).

before'; second, he held that their rights depended upon disputed questions of fact and law; third, he held that they had an adequate remedy of law in the recovery of damages."[40]

In affirming the decision of the district court, Judge Learned Hand wrote a short but significantly unanimous opinion. Of the three grounds, the court found it necessary to consider only the second ground, that the plaintiff's rights depended on disputed questions of fact and law. While briefly analyzing the court's opinion in the *Gardella* case, Judge Hand amplified his own position and, on the intrastate vs. interstate issue, said: "It seemed to me that it was [in the *Federal* case] a question of the proportion of the interstate activities to the whole business and that the new activities of radio broadcasting and television should be added to the earlier interstate activities and the sum should be compared with the business as a whole."[41] The court had before it the controversial "reserve clause" (which is set out in full later in this article) and in reference to it said: "Apart from the question of jurisdiction, we are not prepared to say, on the record now before us, the 'reserve clause' violates the Anti-Trust Acts. Such a determination may involve consideration, among other things, of the needs and conduct of the business as a whole."[42] Judge Frank did not dissent.[43]

As has been indicated, at the time of this writing neither the *Gardella* case nor the *Martin and Lanier* case has been tried on the facts. Irrespective of the outcome of those trials, it seems likely that at least the *Gardella* case will finally be argued before the United States Supreme Court unless, of course, legislation makes moot the issues.[44] In light of the encouragement he has received from the Court of Appeals for the Second Circuit, the

[40] Ibid., at 918.

[41] Ibid., at 918.

[42] Ibid., at 918.

[43] The court did not file a separate opinion in Gardella's action for an injunction pendente-lite but affirmed the district court's denial of the injunction by a per curiam opinion citing as authority its discussion in the Martin and Lanier case. Gardella v. Chandler, 174 F. 2d 919 (C.A. 2d, 1949).

[44] Two identical bills have been introduced in the 81st Congress: H.R. 4018 and H.R. 4019, which provide: "That section 313 of the Communications Act of 1934, as amended, is amended by inserting "(a)" after "313." And by adding at the end of such section the following new subsection:

"(b) No organized professional sports enterprise shall by reason of radio or television broadcasts of sports exhibitions, or by reason of other activities related to the conduct of such enterprise, be held to be engaged in trade or commerce among the several States, Territories, and the District of Columbia, or with foreign nations, or in activities affecting such trade or commerce, within the meaning of any law of the United States relating to unlawful restraints and monopolies or to combination, contracts, or agreements, in restraint of trade or commerce."

It seems unlikely that these, or bills designed to have the same effect, will be pressed for action until the pending cases have reached final decision.

plaintiff is not likely to yield; "organized baseball" has at stake its entire structure.

V. Trade or Commerce?

Gardella, Martin, and Lanier seek damages under the anti-trust laws. In order to bring "organized baseball" within the purview of those laws, two fundamental questions must be answered in the affirmative. (1) Is baseball an interstate activity? (2) Is baseball trade or commerce?

The new element which the plaintiff asserts has been added since the *Federal* case, the broadcast of the play of the games,[45] goes only to the answer to question number one: whether or not "organized baseball" is an intrastate or interstate activity.[46] The Supreme Court, indeed, did hold in the *Federal* case that the business of baseball was giving exhibitions, a "purely state affair,"[47] but assuming arguendo that it is found that selling the right to broadcast does in some way place an interstate aspect on the game, the second fundamental question still remains—is baseball "trade or commerce"?

To state the question thus simply compels a negative answer. "Trade or commerce" inexorably connotes activities of the market place—the buying or selling of a commodity. In answer to those who would conspire to restrain the flow of goods to the market place or who would attempt to monopolize the supply of such goods, with the objective in both instances to fix or raise the price to the consumer, Congress passed the Sherman Act. The meaning of the words "trade or commerce" and the abuse at which the anti-trust laws are directed have been analyzed and stated by the Supreme Court in *Apex Hosiery Co. v. Leader:* "Restraints in competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough, unless the restraint is shown to have or is intended to have *an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition.*"[48] (Italics added.) As Judge Chase put it, dissenting in the *Gardella*

[45] Gardella Complaint, ¶ 30, 31, 33, 34, 35, 36. Martin and Lanier Complaint, ¶ 32.

[46] In a recent Sherman Act case, Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948), the Court seems to have established a new intrastate frontier for the anti-trust laws. There refiners of sugar purchased sugar beets, raised and delivered in refiners' state. Because the ultimate act, the sale of the refined sugar, was admittedly an interstate transaction, the Court ruled the whole process was given an interstate character and the Sherman Act covered the preliminary step, the purchase of sugar beets. The reverse situation is presented by baseball, where the ultimate act, production of the ball game, is an intrastate activity, and the preliminary or ancillary activity is alleged to be interstate.

[47] Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, 259 U.S. 200, 208 (1922).

[48] 310 U.S. 469, 500 (1940).

case, "The Supreme Court has never, so far as I know, applied the Sherman Act in any case unless it was of the opinion that there was some form of restraint upon commercial competition in the marketing of goods and services in interstate commerce. . . ."[49]

By no standard, however elastic, can baseball be considered such "trade or commerce." On the contrary, baseball is a sport, an athletic contest. The function and purpose of "organized baseball" as such, is to provide for, regulate, maintain and discipline such sporting event. The essence of baseball is the game; the essence of the game is the personal, physical efforts of the players in that game. "Trade or commerce" is not involved. There is no production of goods or services which have any effect on either intrastate or interstate commerce. As the appellees in the *Federal* case argued: "Playing baseball, whether for money or not, is a striking instance of human skill exerted for its own sake and with no relation to production. In the case of an exhibition of athletic skill, as in the case of dramatic performance, the onlookers derive nothing but enjoyment."[50]

The rationale of the *Federal* case is that baseball is not trade or commerce, and it is submitted that the court's decision would have been quite the same had the facts shown that every ball park was located on a state line and the players had to pass from one state to another as they ran from first to second base. Justice Holmes said that "the decision of the court of appeals went to the root of the case."[51] The lower court had said that "the game effects no exchange of things according to the meaning of 'trade or commerce' as defined above."[52]

It is believed that only two other decisions have determined specifically the question as to whether or not baseball is "trade or commerce." One of them, *American Baseball Club of Chicago v. Chase*,[53] contains little language to cheer the officials of "organized baseball," and a large portion of it was found by Judge Frank to be useful in support of his quasi-peon theory of ballplayer servitude.[54] When called upon, however, to resolve the argument that "organized baseball" was subject to the Sherman Act because it was "trade or commerce," the court there said:

[49] 172 F. 2d 402, 406 (C.A. 2d, 1949).

[50] Brief of Defendants in Error, Federal case, p. 47.

[51] Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, 259 U.S. 200, 208 (1922).

[52] National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, 269 Fed. 681, 685 (1920).

[53] 86 N.Y. Misc. 441, 149 N.Y. Supp. 6 (1914).

[54] Gardella v. Chandler, 172 F. 2d 402, 410 (C.A. 2d, 1949).

. . . I cannot agree to the proposition that the business of baseball for profits is interstate trade or commerce, and therefore subject to the provisions of the Sherman Act. An examination of the cases cited by the defendant confirms rather than changes my conclusion. Commerce is defined by the Century Dictionary as an "interchange of goods, merchandise or property of any kind; trade, traffic; used more especially of trade on a large scale carried on by transportation of merchandise between different countries, or between different parts of the same country, distinguished as foreign commerce and internal commerce."

The defendant urges that under the National Agreement baseball players are bought and sold and dealt in among the several States, and are thus reduced and commercialized into commodities. A commodity is defined as: "That which is useful; anything that is useful or serviceable; particularly an article of merchandise; anything moveable that is a subject of trade or of acquisition."

We are not dealing with the bodies of the players as commodities or articles of merchandise, but with their services as retained or transferred by contract. The foundation of the National Agreement is the game of baseball conducted as a profitable business, and if this game were a commodity or an article of merchandise and transported from State to State, then the argument of the defendant's counsel might be applicable. . . .

Baseball is an amusement, a sport, a game that comes clearly within the civil and criminal law of the State, and is not a commodity or an article of merchandise subject to the regulation of Congress on the theory that it is interstate commerce.[55]

More recently, the court in *American League Baseball Club of New York v. Pasquel*[56] was confronted with the question of whether or not baseball was trade in relation to a New York statute. There the court said: "Organized baseball has been in existence for many decades. The plaintiff's activities involve the rendition of services. Even if organized baseball, as claimed by defendants, be a monopoly, it would seem that it is not a combination in restraint of trade, either under the provision of Section 340 of the General Business Law, known as the Donnelly Act, or at common law."[57]

Although, in this era of pragmatic thinking, considerations of legislative intent,[58] like the principle of stare decisis[59] and the issue of federal constitutionality,[60] have lost much of their weight as precepts for judicial construc-

[55] 86 N.Y. Misc. 441, 149 N.Y. Supp. 6 (1914).

[56] 187 N.Y. Misc. 230, 63 N.Y.S. 2d 537 (1946).

[57] Ibid., at 540. See American League Baseball Club of New York v. Pasquel, 188 N.Y. Misc. 106, 66 N.Y.S. 2d 743 (1946).

[58] United States v. South Eastern Underwriters Ass'n, 322 U.S. 533 (1944), where the Court, divided four and four, extended the Sherman Act to cover insurance in spite of "overwhelming" evidence of congressional intent to the contrary. See dissenting opinion of Justice Frankfurter. Ibid., at 583.

[59] Comm'r of Internal Revenue v. Church, 335 U.S. 632 (1949); Spiegel v. Comm'r of Internal Revenue, 335 U.S. 701 (1949).

[60] Compare Helvering v. Davis, 301 U.S. 619, 640 (1937).

tion, to the extent that the will of the citizens of the country expressed through the acts of their elected representatives is controlling, it settles this issue. Twenty-seven years ago the Supreme Court ruled that baseball was not "trade or commerce." Since that time both major political parties have at different times had incontestable control of both houses of the national legislature, yet no effort has been made by legislative fiat to bring baseball under the Sherman Act.[61]

On the issues presented by the pending cases it can be affirmatively stated that Congress has, in fact, expressed itself. The rationale of the plaintiffs' cases is not that "organized baseball" is in the television business and that they are damaged because the defendants refuse to show their pictures, but rather that they are baseball players and are being deprived of an opportunity of exercising their efforts in the play of the game. The finding of fact upon which Congress premised the exemption of unions from the anti-trust laws is that "the labor of a human being is not a commodity or article of commerce."[62] To be sure the pending actions do not involve any issues of labor unions and the Sherman Act, but the finding by Congress that the ability to work is not a subject of trade or commerce is pertinent.[63] Manifestly, if baseball is not "trade or commerce" under Section 1 of the Sherman Act,[64] it is not trade or commerce which is subject to a monopoly condemned by Section 2.[65]

VI. Baseball Law: Reasonable or Unreasonable?

Of considerable significance in the disposal of the pending cases will be the question as to whether or not the restraint alleged by the plaintiffs is, in fact, unreasonable. That "organized baseball" has imposed restraints upon itself and all associated with it cannot be gainsaid—that is the very essence of "baseball law." To be condemned, however, those restraints must be unreasonable. Justice Brandeis stated the rule of law in *Chicago Board of Trade v. United States*:

> . . . But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even

[61] And the President gives the game executive sanction by continuing the practice of throwing out the first ball at the season's start—with either his right or his left hand.

[62] Clayton Act § 6, 38 Stat. 731 (1914), 15 U.S.C.A. § 17 (1941).

[63] Gardella v. Chandler, 172 F. 2d 402, 406 (C.A. 2d, 1949).

[64] 26 Stat. 209 (1890), 15 U.S.C.A. § 1 (1941).

[65] 26 Stat. 209 (1890), 15 U.S.C.A. § 2 (1941).

destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. . . .[66]

"Organized baseball" is composed of two major leagues, the National and American, both nonprofit, unincorporated associations composed of eight teams each. The corporations operating the teams are organized for profit under the laws of the several states. In addition to the major leagues are the so-called minor leagues, composed of clubs in various classifications designated as AAA, AA, A, B, C, and D. These classifications are based upon the aggregate population of the cities composing the league[67] and determine, for instance, the number of players a team in a given classification may carry[68] and the monthly salary limit for each club as a whole.[69]

The leagues and the teams which compose them have entered into various agreements to regulate the conduct of "organized baseball" and the play during each league's championship season and any post-season competitions such as the "World Series." These agreements, three in number, compose "baseball law."

The "Major League Agreement"[70] executed by the two major leagues and their sixteen constituent clubs, and the rules promulgated thereunder, relate specifically to the conduct of the major leagues. That agreement creates the office of Commissioner, and gives the Commissioner broad powers to investigate, determine, and discipline conduct found to be "detrimental to the best interests of the national game of baseball."[71] Such discipline may be by way of fine, suspension, or "such other steps as he [the Commissioner] may deem necessary and proper in the interest of the morale of the players and the honor of the game."[72]

Other business communities have never ceased to be amazed at the degree of unbridled power those representing baseball interests have voluntarily surrendered to the Commissioner. The explanation lies in the long history of the game. The very nature of a sports enterprise requires

[66] 246 U.S. 231 (1917).

[67] National Association Agreement § 10.02(a), The Baseball Blue Book 710 (1948).

[68] National Association Agreement § 17.02, The Baseball Blue Book 728 (1948).

[69] National Association Agreement § 180.04, The Baseball Blue Book 730 (1948).

[70] The Baseball Blue Book 501 (1948).

[71] Major League Agreement Art. I, § 2(a), The Baseball Blue Book 507 (1948).

[72] Major League Agreement Art. I, § 4, The Baseball Blue Book 502 (1948).

submission by those competing to the "rules of the game." That has been the characteristic pattern of baseball since its inception. The need of self-discipline and regulatory control of those within the framework of "organized baseball" was underlined in 1919 when certain interests entirely independent of "organized baseball" approached players in an effort to "influence" the outcome of the World Series of that year. Baseball itself discovered and revealed what has been popularly known as the "Black Sox Scandal."

Regular avenues of law enforcement had proved inadequate to protect the integrity of the game. "Organized baseball" concluded that it could and would keep its own house in order so that it might properly command the respect of a sports-loving nation. It was then that the office of Commissioner was created. A federal judge, Kenesaw Mountain Landis, whose courage and integrity were exemplary, stepped down from the bench to assume that office. Following his death, a United States Senator, Albert B. Chandler, resigned that public trust to assume the responsibilities of the office of Commissioner. The power the Commissioner exercises over ownership and players alike is, in many respects, absolute, but the sports community of the country knows and appreciates that "organized baseball" is entitled to command its unquestioned confidence and respect.

In addition to establishing the office of Commissioner, the Major League Agreement and Rules provide in meticulous detail the regulations under which the major leagues operate. A player limit of twenty-five is established; prohibitions against the signing of high-school and American Legion Junior players are provided; rules for selection of players in order that a capable player will not be held in the minor leagues, and waiver rules which prevent a player being transferred from a major to a minor league, are stated; a minimum salary for players of $5,000 is established; the right to own stock in a competing club is denied; rules against misconduct which prohibit and penalize the throwing of games, gifts to umpires and gambling are included; and regulations affecting the World Series are defined.[73] These are a very few of the detailed provisions of the Agreement and Rules.

Under the Major-Minor League Agreement and Rules thereunder,[74] the minor leagues agree to submit to the jurisdiction of the Commissioner, and in the agreement the major and minor leagues defined the rules for the conduct of those leagues.

[73] Major League Rules 2(a) and (b), 3(i), 3(j), 5(a)–(f), 10, 17(d), 20(a)–(e), 21, 33–50. The Baseball Blue Book 508, 512–14, 531–34, 539 (1948).

[74] The Baseball Blue Book 601 et seq. (1948).

The third agreement, rounding out "baseball law," is the National Association Agreement.[75] This document creates the office of President of the National Association, now occupied by George M. Trautman, and gives to that office many of the powers of discipline over minor leagues reposed in the Commissioner over the majors. This agreement establishes rules for the conduct of the minor leagues.

Rule 3A of the Major-Minor League Rules provides:

> To preserve morale and to produce the similarity of conditions necessary to keen competition, the contracts between all clubs and their players in the Major League shall be in a single form which shall be prescribed by the Major League Executive Council; and the contract between all clubs and players in the Minor Leagues shall be in a single form which shall be prescribed by the President of the National Association. No club shall make a contract different from the uniform contract, and no club shall make a contract containing a non-reserve clause except permission be first secured from the Major League Executive Council in case of a Major League player, or from the President of the National Association in case of a Minor League player. The making of any agreement between a club and a player not embodied in the contract shall subject both parties to discipline; and no such agreement, whether written or verbal, shall be recognized or enforc d.[76]

Rule 3(a) of the Major League Rules[77] and Section 15.01 of the National Association Agreement[78] contain similar language.

Each such "uniform contract" incorporates, by reference, the Major-Minor League Agreement and Rules and either the National Association Agreement or Major League Agreement, as the case may be,[79] and requires the signatories' assent to all decisions of the Commissioner of Baseball. Thus, the Uniform Player's Contract becomes the instrumentality by which the players assent to and become regulated by "baseball law."

The court of appeals in the *Gardella* case did not attempt to analyze the player's contract as such. Although Judge Frank made some fairly harsh observations about the contracts, the court did not have before it the text of the contract and the rules incorporated therein, or any evidence as to the purpose, operation and effect of the contract and rules as bearing upon the reasonableness of the restraints contained in them.[80] It is likely, however, that considerable attention will be given to its terms and provisions in the trial of the case. Of particular interest will be the "reserve clause" and the power of the club to assign a player's contract.

[75] Ibid., at 701 et seq.

[76] Ibid., at 609.

[77] Ibid., at 508.

[78] Ibid., at 719.

[79] Minor League Contract § 7a; Major League Contract § 9a.

[80] Compare the same court's comments in Martin and Lanier v. Chandler, 174 F. 2d 917 (C.A. 2d, 1949).

VII. The Reserve Clause

The paragraph providing for renewal, or the "reserve clause," in the current major-league Uniform Player's Contract provides:

> 10. (a) On or before February 1st (or if a Sunday, then the next preceding business day) of the year next following the last playing season covered by this contract, the Club may tender to the Player a contract for the term of that year by mailing the same to the Player at his address following his signature hereto, or if none be given, then at his last address of record with the Club. If prior to the March 1 next succeeding said February 1, the Player and the Club have not agreed upon the terms of such contract, then on or before 10 days after said March 1, the Club shall have the right by written notice to the Player at said address to renew this contract for the period of one year on the same terms, except that the amount payable to the player shall be such as the Club shall fix in said notice; provided, however, that said amount, if fixed by a Major League Club, shall be an amount payable at a rate not less than 75% of the rate stipulated for the preceding year.
>
> (b) The Club's right to renew this contract, as provided in subparagraph (a) of this paragraph 10, and the promise of the Player not to play otherwise than with the Club have been taken into consideration in determining the amount payable under paragraph 2 hereof.

It is in the use of the clause just quoted that Judge Frank found "virtual slavery";[81] yet in that clause lies the secret of baseball's successful operation year after year. Upon the proposition that the "reserve clause" is absolutely necessary to baseball, the officials, owners and players are in total agreement. In their brief the defendants in the *Gardella* case said: "The restraint of which the plaintiff here complains, namely, the reserve clause and the Commissioner's disciplinary power, are the very heart of the system of self-regulation by which Baseball has preserved the competition and integrity which are the public's principal concern."[82]

The players in whose contracts the "reserve clause" appears are even more positive. The Committee on Labor and Industries of the Massachusetts Legislature recently held hearings on a bill[83] to outlaw the "reserve clause" in baseball player contracts. John Murphy, a pitcher for the New York Yankees, who had been elected by the players on the eight teams in the American League as their spokesman, and Dixie Walker, an outfielder for the Pittsburgh Pirates, similarly elected as spokesman for the players in the National League, appeared at the hearing. Murphy advised the Committee of a meeting held to discuss the "reserve clause" by represen-

[81] Gardella v. Chandler, 172 F. 2d 402, 410 (1949).

[82] Appellee's Brief, p. 30.

[83] Massachusetts Legislature, House Bill No. 1636 (1948).

tatives of the players from each team in the American League. His testimony was:

> We knew what it [the reserve clause] meant. It simply means that at the end of the year, or the following spring the ball club owners have the right to resume their option on our services. We spoke as informally as that in our meeting, and we said that is the only way baseball can continue; that if our livelihood is to continue, we have to have that in our contract, as an integral part of the contract, because without that clause if a ball player were free to sign up with anybody whom he pleases at the end of that year or the next spring, why, the whole structure of the game would be destroyed. . . .[84]

Dixie Walker reported that he had been a player in "organized baseball" for twenty years and had "never heard any of the ball players who have said that they were anxious to have that [reserve] clause stricken out." Walker affirmed John Murphy's testimony, adding that "the ballplayers felt that it [the reserve clause] should be left as it was, because it was the very backbone of the game."[85]

The minor leagues, as well as the majors, benefit from and are dependent on the "reserve clause." A substantial percentage of the teams in the minors have direct identity with major league teams either by ownership or "working agreements" under the "farm system." That system gives an associated team the benefit of the financial stability of its parent club, the advantage of its scouting system and, most important, the use of its personnel in training and developing young players. The accomplished result has been more teams in the minors, hence, more communities with baseball, more players gainfully employed and more quickly trained for participation in the major leagues. Without the "reserve clause" and the attendant right to claim a player's services as he is thus trained, no major league team would undertake the considerable expense required to operate a farm system.

The "reserve clause" is designed to prevent raids by wealthy clubs upon the players of poorer members of the league, thereby preserving more equal competition from year to year and maintaining more stable identity of players with clubs and the baseball fans of their communities. As the Court of Appeals in the *Federal* case said, ". . . [I]f the reserve clause did not exist, the highly skillful players would be absorbed by the more wealthy clubs, and thus some clubs in the league would so far outstrip

[84] Hearing, Committee on Labor and Industries, Massachusetts Legislature, January 22, 1948.

[85] Ibid. George "Birdie" Tebbetts of the Boston Red Sox appeared, as well, and told the committee, "I am a baseball player and I have no connection with management, and I have no sympathy with them. . . . However, there is no reason that I can see why this bill [outlawing the "reserve clause"] should go through, because if it does it will absolutely ruin the baseball players. It will deprive fellows like me of a tremendous earning power in baseball."

others in playing ability that the contest between the superior and inferior clubs could be uninteresting, and the public would refuse to patronize them."[86]

Theoretically, except for the seventy-five percent proviso, the "reserve clause" gives the player no alternative to a grossly inadequate salary. In practice that has never been the case. Efforts to produce "awful examples of the operation of the reserve clause" during the trial of the *Federal* case were unavailing.[87] It is unlikely that any will be produced at the trial of the pending actions. The average age of the players in the National League at the beginning of the 1949 playing season was 27.31 years;[88] the average salary for the five and one-half months' season was approximately $12,000.

The reason for lack of abuse of the "reserve clause" lies in the nature of the game more than in the "benevolent" aspects of the baseball "dictatorship."[89] There is always a shortage of capable players; the threat of voluntary retirement is efficacious. More than that, esprit de corps, possible only with salary-satisfied players, is essential to a winning team. As some evidence of the success of baseball's "collective bargaining" stands the fact that at the commencement of the 1949 season there were no "hold outs" among the more than 600 major league players, a situation which is more the rule than the exception. Dictates of competition on the playing field prohibit abuse of the "reserve clause."

VIII. Power To Trade

The second feature of the player's contract which will be given attention upon the trial of the pending cases is the right given the club to assign a player's contract. In order, in fact, to prohibit a monopoly such as the pending cases allege, each club in the major leagues is restricted to a

[86] National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, 269 Fed. 681, 687 (1920).

[87] Brief on Behalf of Defendants in Error, p. 14.

[88]

NATIONAL LEAGUE AVERAGE AGES AS OF MARCH 1, 1949

	Catchers	Infielders	Outfielders	Pitchers	Team
1. Brooklyn	26.45	26.23	26.15	26.22	26.22
2. Philadelphia	27.17	27.61	24.77	27.06	26.77
3. New York	29.00	28.38	26.41	26.15	27.25
4. Chicago	24.86	26.52	26.37	28.75	27.28
5. Boston	29.00	28.31	28.97	25.78	27.31
6. Cincinnati	26.40	27.56	27.52	27.51	27.35
7. St. Louis	27.99	27.03	27.03	27.05	27.40
8. Pittsburgh	27.51	28.46	28.67	29.58	28.93
League	27.35	27.49	27.01	27.35	27.31

[89] Compare Gardella v. Chandler, 172 F. 2d 402, 415 (C.A. 2d, 1949).

player roster of twenty-five men. Because of this limit, however, it is necessary to the game and to the welfare of the players that the clubs have the right, by assignment, to exchange players skilled in the play of one position, but not needed or being used, for other players needed to strengthen the team. The right of assignment is a valuable and necessary right in management. The players agree:

That is another way of keeping competition in baseball. One club will think they have too many pitchers, and another club has too many infielders, and the only way to maintain a balance is for one club to trade a pitcher for two infielders, or vice versa. It is the structure of baseball. The fans love it and the players love it. In most cases of trades of players, I would say nine out of ten times the player receives an increase in salary when he is transferred from one club to another, because the new owner wants a satisfied ballplayer. . . . We knew that was part of our business of baseball as much as balls and strikes, and we went right along with it.[90]

"Baseball law" surrounds the right of assignment with specific protections in the players' interests. Under the "waiver system" it is impossible to assign a player to a classification lower than he holds unless all other teams of that classification claim no interest in his services. Similarly the "selection system" allows a team of higher classification to force the assignment of a player's contract against the will of his club, thereby assuring that a capable player will not get lost in the minor leagues.

The assignment of rights to personal services often presents troublesome aspects. The Uniform Player's Contract anticipates and provides for that right.[91] Williston in his work on Contracts says, "Rights which would not

[90] John Murphy's testimony before Committee on Labor and Industries, Massachusetts Legislature, January 22, 1948.

[91] The Uniform Player's Contract provides:

"6. (a) The Player agrees that this contract may be assigned by the Club (and reassigned by any assignee Club) to any other club in accordance with the Major and Major-Minor League Rules.

"(b) The amount stated in paragraph 2 hereof which is payable to the Player for the period stated in paragraph 1 hereof shall not be diminished by any such assignment, except for failure to report as provided in the next sub-paragraph (c).

"(c) The Player shall report to the assignee Club promptly (as provided in the Regulations) upon receipt of written notice from the Club of the assignment of this contract. If the Player fails so to report, he shall not be entitled to any payment for the period from the date he receives written notice of assignment until he reports to the assignee Club.

"(d) Upon and after such assignment, all rights and obligations of the Assignor Club hereunder shall become the rights and obligations of the assignee Club; provided, however, that

(1) The assignee Club shall be liable to the Player for payments accruing only from the date of assignment and shall not be liable (but the assignor Club shall remain liable) for payments accrued prior to that date.

(2) If at any time the assignee is a Major League Club, it shall be liable to pay the Player at the full rate stipulated in paragraph 2 hereof for the remainder of the period stated in paragraph 1 hereof and all prior assignors and assignees shall be relieved of liability for any payment for such period.

otherwise be capable of assignment because too personal in their character, and duties, the performance of which for a similar reason could not be delegated, may be assigned or delegated if the contract so provides. . . ." And the author continues in the footnote: "Thus the contracts of professional ball players often contain provisions enabling a club which has employed a player to assign to another club the right to his services. See Griffin v. Brooklyn Ball Club, 68 App. D. 566, 73 N.Y.S. 864, aff'd., 174 N.Y. 536; Baseball Players' Fraternity v. Boston, etc., Club, 166 App. D. 484, 151 N.Y.S. 557."[92]

Were the "reserve clause" and the right to assign players' contracts abolished, there would immediately be introduced incentives tending to destroy the loyalty of players to their team, an element so important to the integrity of the game. For instance, if a player knew he would be a "free agent" at the end of a season he might be tempted to shop around for next season's job and to relax his efforts if he thought he had made an arrangement with another team. In the case of assignments, if the player had the right to stipulate as to where and when he would be assigned, there would be an incentive for a player to endeavor to make a deal for himself during the season and to have divided loyalties which would inevitably affect the quality of his play. There can be no doubt that the integrity of the game and the public confidence in it would be adversely affected if players became free to move from club to club at their own choice.

"Baseball law" and the Uniform Player's Contract, for which it provides, are designed solely for the production of baseball games and to preserve all aspects of the game's integrity. For the plaintiffs, Gardella, Martin and Lanier, to prevail, it will be necessary for the court to find such an arrangement unreasonable.[93]

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(3) Unless the assignor and assignee clubs agree otherwise, if the assignee Club is a Minor League Club, the assignee Club shall be liable only to pay the Player at the rate usually paid by said assignee Club to other players of similar skill and ability in its classification and the assignor Club shall be liable to pay the difference for the remainder of the period stated in paragraph 1 hereof between an amount computed at the rate stipulated in paragraph 2 hereof and the amount so payable by the assignee Club.

"(e) In the event this contract is assigned by a Major League Club during the playing season, the assignor Club shall pay the Player his reasonable and actual moving expenses resulting from such assignment up to the sum of $500.

"(f) All references in other paragraphs of this contract to "the Club" shall be deemed to mean and include any assignee of this contract."

[92] 2 Williston, Contracts § 423 (1936).

[93] In his complaint Gardella alleged:

"72. That the defendants are utilizing the 'reserve clause,' the standard Minor League contract, the Major League Agreement, the Major League Rules, the Major-Minor League Agreement and the Minor League Rules, contrary to the settled principles of equity and common

IX. And Not Baseball Alone

It may be obvious without comment that "organized baseball" is not alone on the execution block. All professional sports, because of the problems common to all, have adopted systems similar to that under which "organized baseball" operates. Another observation, which may be categorized as a reductio ad absurdum but which nonetheless is compelled by consideration of this subject, is the effect on college football of a final decision that baseball does violate the anti-trust laws. The production of football, at least by the larger universities, is strikingly similar to that of "organized baseball." Teams cross state lines, they carry paraphernalia with them, admissions are charged the spectators, the games result in profit for the sponsoring universities, "scholarships" make participation "attractive" for the players, and the games are broadcast and televised by interstate facilities. More than that, practically every university in the country, to prevent "jumping" and "raids on its players," enforces the "one-year rule" under which a player, having played for a university, is deprived of the opportunity of playing football the succeeding year if he transfers to another university. Percentagewise his loss of one of three years is strikingly similar to Gardella's loss of five years out of an expected playing life of fifteen years. Can it be said that the application of the "one-year rule" has not "deprived such a player of his occupation?" Is every university president whose institution subscribes to and enforces the

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law, and to monopolize or attempt to monopolize trade or commerce among the several states and with foreign nations contrary to Section 2 of the Sherman Anti-Trust Act (15 U.S.C.A., Sec. 2) and to Section 13 of the Clayton Act (15 U.S.C.A., Sec. 13)." In answer the American League replied, in part:

"Further answering paragraph 72, defendant alleges: The form of the player contract, the Major League Agreement, the Major League Rules, the Major-Minor League Agreement and the Minor League Rules have evolved naturally and progressively to meet the unique conditions necessarily inherent in a sport in which contests can only be played between independent competing teams. The form of said contract provisions, agreements and rules has evolved and has been determined by what was reasonable and necessary from time to time, to promote the highest degree of competition between teams and to safeguard and preserve the integrity of the game and the conditions under which it is played. The overall objects and purposes of the contract provisions, agreements and rules are, and have been, to perpetuate baseball as the national game of the United States, to surround it with the safeguards necessary to warrant the highest public confidence in its integrity and in the manner in which the game is played and to provide uniform rules and regulations for umpiring, scoring and other matters involved in the playing of the game. These objectives were and are beneficial to, and necessary for the protection of, the proper interests of the players, the Clubs and the public in the game. The contract provisions, agreements and rules are both reasonable and essential to protect and preserve the respective interests of the players, the Clubs and the Public in the game and to preserve the existence of the game itself. Experience has demonstrated that such contracts, agreements, rules and regulations operate, and have operated, with great benefit to the public interest in the national game of baseball and that their prohibition would not only unjustifiably injure the interests of players and Clubs but also would irreparably injure the public."

"one-year rule" guilty of a misdemeanor and liable, under the Sherman Act, to a fine of $5,000 and one year's imprisonment?

A decision by the United States Supreme Court reversing its ruling in the *Federal* case and finding that "organized baseball" is "interstate trade or commerce," its restraints unreasonable, and therefore in conflict with the Sherman and Clayton Acts, would have a profound effect upon organized sports in this country. It is a fairly standard technique for each industry when first charged with violating the anti-trust laws to respond with the cry that only ruin to that industry lies in an application of the anti-trust laws to its particular restraints. The frequent use of that assertion, however, does not deny its validity respecting any particular set of facts. It is the serious judgment of both management and players that a finding that the operation of "organized baseball" violates the anti-trust laws would mean the end of baseball as we know it. Such a consequence will not be taken lightly by any court.

It is difficult to conceive a rationale upon which a decision compelling that result might be based. Overruling the *Federal* case would assuredly not serve the ends of social justice. In opposition to the interests of three young men who consciously breached their contracts and deliberately and knowingly subjected themselves to the prescribed penalty for such action are the interests of those representing the ownership of baseball, the thousands of players who each year realize a substantial and often extraordinary income from their playing efforts, and, of paramount importance, the interest of a sports-loving public which has through its emotional and monetary support made baseball the "National Game."

MY TRIAL AS A WAR CRIMINAL*

LEO SZILARD†

I WAS just about to lock the door of my hotel room and go to bed when there was a knock on the door and there stood a Russian officer and a young Russian civilian. I had expected something of this sort ever since the President signed the terms of unconditional surrender and the Russians landed a token occupation force in New York. The officer handed me something that looked like a warrant and said that I was under arrest as a war criminal on the basis of my activities during the Second World War in connection with the atomic bomb. There was a car waiting outside and they told me that they were going to take me to the Brookhaven National Laboratory on Long Island. Apparently, they were rounding up all the scientists who had ever worked in the field of atomic energy.

Once we were in the car the young man introduced himself and told me that he was a physicist as well as a member of the Moscow Chapter of the Communist Party. I had never heard his name before and I was never able to remember it thereafter. He was obviously very eager to talk. He told me that he and the other Russian scientists were all exceedingly sorry that the strain of the virus which had been used had killed such a disproportionately large number of children. It was very fortunate, he said, that the first attack was limited to New Jersey and that the early cessation of hostilities made attacks of larger scope unnecessary. According to plan—so he said—stocks of this virus were merely held in reserve for an emergency. Another virus differing by five further mutational steps had been in the stage of pilot plant production, and it was this improved virus which was meant to be used in case of war. It would not affect children at all and would kill predominantly men between twenty and forty. Owing to the premature outbreak of the war, however, the Russian government found itself forced to use the stocks which it had on hand.

He said that all the scientists arrested would be given a chance to go to Russia, in which case they need not stand trial as war criminals; but that

* The editors originally requested permission to publish this article in June, 1948. The author was then reluctant to release it for publication because at that time political tensions would have made it difficult for the reader to be receptive to the particular treatment of the subject adopted in the article. With the present relaxation of these political tensions, the author has withdrawn his objection to publication.

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if I should elect to stand for trial he personally hoped that I would be exonerated and that afterwards I would be willing to collaborate with the Russians here in the United States.

He said that the Russians were very anxious to get the support of people other than the American Communists for a stable political regime in the United States which would collaborate with them. Since they now had the support of the Communists anyway, he explained, they would rather bestow their favors on those whose cooperation was not yet assured. "We shall, of course, lean on the Communists for the next few months," he said, "but, in the long run, dissatisfied elements who are used to conspiracy would not be relied on by us." "It is difficult to work with fellows who have no sense of humor," he added as an afterthought.

He told me that no scientist would be forced to go to Russia and that no one who was innocent need go there for fear of having to stand trial as a war criminal, because, he said, Russia would do everything in her power to make the trials fair and impartial. "The outcome of a bona fide trial," he added somewhat illogically, "is, of course, always something of a toss up."

He told me that he expected that Russia would, within a fortnight, change her position on the question of world government; that she would come out in favor of it, in principle, and that she would press for immediate strengthening of the United Nations. The tribunal which was being assembled to try war criminals would not be Russian-dominated, he said, but would rather be composed of representatives of all nations which were not at war with Russia.

I was surprised to hear him say that he expected Great Britain to delegate the Lord Chief Justice to sit on the tribunal, and, frankly, I did not believe him then, though, of course, this was technically not impossible since the coalition cabinet had declared Britain's neutrality twenty-four hours before the outbreak of the war. His prediction was confirmed, however, the following morning when the newspapers reported the speech of the British Prime Minister who had said that Great Britain, having participated in the Nuremberg trials, could not now refuse her participation without being guilty of displaying a double standard of morality. The information which I received from this young man proved to be most valuable to me because it gave me time to make up my mind as to what line I would want to follow.

As far as going to Russia was concerned, my mind was made up. Having been raised in Hungary, I had lived in Germany and in England before I settled in the United States, and that is as much migration as is good

for any man. Moreover, when you are above fifty you are no longer as quick at learning languages. How many years would it take me to get a sufficient command of Russian to be able to turn a phrase and to be slightly malicious without being outright offensive? No, I did not want to go to Russia.

Even less did I want to be put in the position of having favors bestowed upon me by the Russians or of having to refuse point-blank some position of importance which they might wish to offer to me. I did not want to incur the favor of the Russians, but I did not want to antagonize them either. After devoting some thought to this dilemma, I decided that the best way for me to keep out of trouble was to stick to the truth and thereby to arouse the suspicion of the Russians.

I did not have to wait long for an opportunity to implement this plan of action. The next morning at Brookhaven I was interrogated by a Russian official. In the beginning his attitude was rather benevolent. Almost the first question he asked me was why I had not worked in the field of atomic energy prior to the Third World War. When I truthfully said that I had five good and valid reasons and named them one by one, he took them down in shorthand, but the longer I talked the more incredulous he looked. It was obvious that he felt himself unable to believe what I was saying to him. Realizing that my method worked, I answered all his questions as truthfully as I possibly could and then signed the transcript at the end of the interview.

I was called back for further interrogation in the afternoon; this time it was an older Russian scientist who was known to me by name, but whom I had not previously met. He told me that he had asked to see me because he had read the transcript which I had signed in the morning. He said that the Russian scientists had followed with great interest the articles I had written before the war, and he quoted to me passages from articles entitled "Calling for a Crusade" and "Letter to Stalin" which I had published in the *Bulletin of the Atomic Scientists* in 1947. This pleased me very much. He went on to say, however, that these articles showed an almost incredible degree of naïveté and were models of un-Marxian writing. He acknowledged that they were free from any anti-Russian bias and told me that the Russian scientists had formed the opinion that I had not been working in the field of atomic energy before the Third World War because I had not wanted to make bombs that would be dropped on Russia. He said that he regretted that I had not given this as my reason, that he wanted to give me an opportunity to revise the answers which I had given, and that he was prepared to tear up my signed statement then and there,

though by doing so he would be sticking his neck out, since he would be acting against regulations.

I thanked him for his kindness and told him that I had merely told the truth which, unfortunately, was not within my power to change; and there then ensued a most interesting and protracted conversation about the intrinsic value of truth. Since what he told me was told in confidence and might get him into trouble if revealed, I do not feel free to record it here.

The war crimes trials opened about one month later at Lake Success and I was—apparently as a special favor—among the first to be tried. I was charged by the prosecutor, a Russian, first of all with having tried to induce the United States government to take up the development of atomic energy in a meeting held on October 21, 1939, i.e., at a time when the war in Europe was still an imperialist war, since Germany had not attacked Russia until 1941.

I was also charged with having contributed to the war crime of dropping an atomic bomb on Hiroshima. I thought at first that I had a good and valid defense against this latter charge, since I had warned against the military use of the bomb in the war with Japan in a memorandum which I had presented to Mr. Byrnes at Spartanburg, South Carolina, six weeks before the first bomb had been tested in New Mexico.

But unfortunately this memorandum, which Mr. Byrnes had put into a pocket of his trousers when I left him, could not be located by Counsel for the Defense either in the files of the State Department or in the possession of any of the Spartanburg cleaners who might have kept it as a souvenir. Mr. Byrnes was himself under indictment and was not called as a witness. Excerpts from the memorandum which were published in the fall of 1947 in the *Bulletin of the Atomic Scientists* were stricken from the record on the ground that the parts of this memorandum which were omitted from the publication for reasons of secrecy might have contained the opposite of what the published part of the document appeared to indicate.

Under these circumstances I had to fall back for my defense on a petition which I had circulated in the Uranium Project at the University of Chicago immediately after the testing of the bomb in New Mexico and which asked the President to withhold his approval of a military use of the bomb against the cities of Japan. The prosecutor moved, however, that this document be stricken from the record on the ground that it was not transmitted by me to the President directly, but was rather handed by me to the head of the project, who forwarded it through the Manhattan District of the War Department, headed by General Groves. The prosecutor said that I, Szilard, should have known better than to agree to such a method of transmittal.

Having rested my defense I was now free on bail. Since I was not permitted to leave Lake Success I was spending my time there listening to the trials of the statesmen and scientists. In spite of the seriousness of my own situation, I found it difficult sometimes to refrain from joining in the laughter which frequently interrupted the proceedings.

As a prelude to the Nuremberg trials, war crimes had been defined with the collaboration of the United States, represented by Justice Jackson of the United States Supreme Court. The "violations of the customs of war" had been defined as a war crime at that time. "Planning a war in violation of international agreements" had been also defined as a crime.

The first statesman to be tried on charges arising from the bombing of Hiroshima was Mr. Stimson, and he was tried on his own admission contained in an article which he had published in 1947 in *Harper's*. The prosecution pointed out that the "defense" put forward by Mr. Stimson in that article was untenable. Mr. Stimson's point was that, had the bomb not been used, millions would have perished in an invasion of Japan. The prosecutor, a Dutchman, quoted from a memorandum prepared after the surrender of Japan by the United States Strategic Bombing Survey which showed that the United States could have won the war against Japan without invasion, just by sitting tight, since Japan was essentially defeated before the bomb was dropped on Hiroshima. He further quoted passages from the book *Secret Mission*, by Ellis M. Zacharias, published in 1946, which showed that Japan's desperate position must have been known to Mr. Stimson, since it was fully disclosed in the reports prepared by the United States Naval Intelligence.

Counsel for the Defense, however, submitted a deposition obtained from the British Secretary of War in order to prove that secretaries of war never based decisions on reports prepared by the Naval Intelligence. "Mr. Stimson," so Counsel for the Defense said, "should not be reproached for acting as all Secretaries of War in all English-speaking countries have acted at all times."

The presiding judge, in summing up, disregarded the arguments presented by both the prosecution and the defense and took the line that prior to the Third World War it was not *customary* to drop atomic bombs on towns and cities, and that such a "violation of the customs of war" was a war crime which could not be justified on the ground that the government which committed it hoped that by doing so, it would bring the war to a speedier conclusion.

It was expected that Mr. Stimson would be found guilty on his own admission but that he would be reprieved primarily because of his article published in *Foreign Affairs* in 1947 in which he commented on the for-

eign policy of the Truman administration. It was generally considered that in 1947 his was a voice of reason and moderation in the midst of general confusion.

Mr. Truman was charged with the "crime" of actually ordering the bombing of Hiroshima. At first, Counsel for the Defense took the line that at the time when the definition of war crimes was made public at Nuremberg, Mr. Truman was at sea—in the literal sense of the term. He was on board a battleship on his way back from Potsdam and did not have opportunity adequately to study the text of the Nuremberg Declaration prior to the bombing of Hiroshima. This plea was rejected by the court on the ground that those who were sentenced to death and executed at Nuremberg could—if they were alive—use much the same type of argument in their defense.

Subsequently, Counsel for the Defense took the line that Mr. Truman was not guilty because he had not acted on his own but had merely followed advice given to him and that, so to speak, he had been merely following orders. In proof of this the defense read into the record a magazine article published by Garbatov in Russia in 1947 which asserted that Mr. Truman had always been taking orders from one boss or another. This article had drawn a protest from the American ambassador at the time of its publication.

Having had little luck with any of his "lines," Counsel for the Defense raised the questions why the use of an atomic bomb should be considered as a "violation of the customs of war" any more than the use of a virus that killed children. But the presiding judge ordered his remark stricken from the record, saying that this was the trial of Harry S. Truman and not of Somebody Else and that since Mr. Truman was not accused of having ordered the use of a virus in warfare, nothing relating to any virus could possibly be relevant to his defense.

It was generally expected that Mr. Truman would be found guilty but it was rumored that there were powerful Russian influences at work to have him reprieved. There were all sorts of guesses as to what the reasons of the Russians may have been, and some thought that they favored Mr. Truman on account of his supposed Wall Street connections, since the Russians were known to nurture a secret admiration for Wall Street. I, myself, believe that the reason of the Russians may have been political and rather difficult to guess in detail without knowing on which of their misconceptions it was based.

The next to be tried was Mr. Byrnes, who was not only accused of being responsible for the decision of using the atomic bomb against Japan, but,

above all, was accused of having advocated a war against Russia "in violation of international agreements" in his book *Speaking Frankly*, which appeared in 1947. The British prosecutor quoted from page 203 of the first edition:

> . . . I do not believe the Red Army would try to hold permanently all of Eastern Germany. However, if I misjudge them, and they do go to the point of holding Eastern Germany and vetoing a Security Council Directive to withdraw occupation forces, we must be prepared to assume the obligation that then clearly will be ours. If our action is to be effective, we must be clear in our minds and must make it clear to all that we are willing to adopt these *measures of last resort* if, for the peace of the world, we are forced to do so.

On this passage Mr. Byrnes was most severely cross-examined by the prosecutor. He was asked whether he was aware of the fact that the United States ratified the Charter of the United Nations at the time when Mr. Byrnes himself was Secretary of State. He was asked whether he was aware of the fact that by doing so the United States undertook the solemn obligation of refraining from war and that, under Article 51 of the Charter, the United States merely retained the right of waging war in case of an *armed attack*. He was asked whether the mere refusal of Russia to leave the territories which she had occupied after the Second World War could be construed as an armed attack. He was asked whether he could suggest any way of interpreting what he had been saying on page 203 of his book other than as advocating that the United States ought to violate her solemn obligation under the Charter and wage an illegal war against Russia in case Russia should refuse to settle on the terms set by the United States government.

Counsel for the Defense replied that he wished to elucidate the meaning of the passage "measures of last resort" quoted by the prosecutor from Mr. Byrnes' book. At a press conference following shortly the publication of his book, Mr. Byrnes himself, had explained this passage—so Counsel for the Defense said. "There is no suggestion as to whether such collective action should be persuasion, economic, or military action," Counsel quoted. "Clearly," Counsel said, raising his voice a little, "if Mr. Byrnes had had *military action* in mind, he would have spoken of *measures of very last resort* and not merely of *measures of last resort*." "British statesmen," he said, looking sharply at the prosecutor, "may indulge in understatements, but that is no reason for accusing my client of one."

The prosecutor replied that Mr. Byrnes had condemned himself by the very words quoted by the defense, for by virtue of those words Mr. Byrnes had admitted that the term "measures of last resort" meant either persuasion *or* military action. "I am not conversant with American law,"

he said, "but surely in England a man who publicly proclaims that he is going to get hold of something that is in the possession of his neighbor either by persuasion *or* by pulling a gun on him is persuaded to go to jail."

At this point, Counsel for the Defense submitted evidence to show that, two weeks before the outbreak of the Third World War, Mr. Byrnes had sent a memorandum to the President of the United States warning against any agressive act on the part of the United States Armed Forces that would result in war. The prosecutor's motion that this memorandum be ruled out as evidence was upheld by the presiding judge on the ground that if inconsistency were admissible as a defense at the trial of a statesman, then no statesman could ever be convicted as a war criminal and the statesmen would enjoy an immunity not shared by the other defendants.

All of us who attended his trial were unanimous in our praise of Mr. Byrnes for the patience and firmness he displayed. Of course, if sentence had been passed and executed, he would have lost his life; but as is generally known, no sentence was ever passed on Mr. Byrnes or any of the rest of us. The first Russian appeal for help reached the United States Public Health Service one week after Mr. Byrnes rested his defense.

Just what happened will never be known with certainty. This much is clear, that the vast quantities of vaccine which the Russians held in readiness to safeguard their own population against the virus were absolutely without any effect. In the laboratory tests such vaccine had proved to be 100 per cent effective; something must have gone wrong in the changeover from pilot plant operation to mass production, and *someone* must have forgotten to check the product for its effectiveness. Since the engineer in charge of the production plant at Omsk perished in the disorders which broke out after over half of the children of the town had died, and since all records of the production plants were destroyed in the fire, we shall never know just what had gone wrong.

The terms of the post-war settlement which had been reached within two weeks of the Omsk riots were in every respect very favorable to the United States and also put an end to all war crime trials. Naturally, all of us who had been on trial for our lives were greatly relieved.

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NOTES

CONSTRUCTION OF INTENT IN LIMITATIONS TO GRANTOR'S HEIRS

A transferor of property, wishing to anticipate the possible failure of a limitation because his beneficiaries may die prior to becoming entitled to their interests, may often designate his own heirs or those of a grantee as his ultimate beneficiaries. "Heirs" is a particularly suitable term for this ultimate limitation be-

cause the class is not likely to fail for want of persons complying with the description. Nevertheless, the draftsman of such an instrument may be treading on dangerous ground. While he is perhaps wary of the pitfalls of the rule in *Shelley's Case*, its companion doctrine, the rule of "worthier title," has not attained comparable notoriety. Unless the latter is also considered, his grant may constitute an invitation to litigation.

At common law an ultimate limitation to a grantor's heirs after an estate tail or a lease for life resulted not in a remainder to the heirs but in a reversion in the grantor.[1] Several explanations were advanced for such construction. The rule was probably based on the feudal preference for title by descent over title by purchase, originating in the desire of the overlords to preserve valuable incidents accruing to them when property passed by descent.[2] Lord Coke thought the principle behind the rule to be the common-law fiction that "the ancestor during his life bears in his body (in judgment of law) all his heirs."[3] Later authority saw the doctrine as a special application of the rule in *Shelley's Case*,[4] while still others propounded the maxim *nemo est haeres viventis*.[5] Although the rule was abolished in England by statute in 1833,[6] the doctrine of worthier title has been applied in modified form by the American courts as a "rule of construction." In the leading case of *Doctor v. Hughes*,[7] Judge Cardozo, speaking of a limitation to the heirs of the settlor of an inter vivos trust, declared that "to transform into a remainder what would ordinarily be a reversion the intention to work the transformation must be clearly expressed."[8] Largely on the authority of *Doctor v. Hughes*, an increasing number of American courts have given effect to the grantor's clearly expressed intention to transfer a remainder to his heirs.[9] As

[1] Bingham's Case, 2 Co. Rep. 91a (K.B., 1600); Read v. Erington, 78 Eng. Reprint 571 (K.B., 1594); Bedford v. Russel, 79 Eng. Reprint 1126 (K.B., 1593); Fennick v. Mitford, 74 Eng. Reprint 168 (K.B., 1589); 2 Bl. Comm. *176; 2 Washburn, Real Property § 1525 (1902).

[2] Rest., Property § 314 Comment a (1940).

[3] Co. Litt. *22b. Coke states that the same principle accounts for the construction in the more common case, "that if land be given to a man and his heirs, all his heirs are so totally in him, as he may give the lands to whom he will." Ibid.

[4] "In this case, inasmuch as the interest limited to the heirs special of the grantor cannot vest until his death, and the preceding interest may regularly expire before his death, nay the very instant after delivery of the deed creating them, there is a freehold use remaining undisposed of in the grantor, sufficient to attract the operation of the rule [in Shelley's Case]." 2 Fearne, Contingent Remainders 226 (1844).

[5] Brolasky's Estate, 302 Pa. 439, 153 Atl. 739 (1931); Glenn v. Holt, 229 S. W. 684 (Tex. Civ. App., 1921); Robinson v. Blankenship, 116 Tenn. 394, 92 S.W. 854 (1906). The principle, however, would not seem to preclude the interest from vesting if the grantor predeceases the life beneficiary. See 1 Fearne, Contingent Remainders 309 (1844).

[6] 3 & 4 Wm. IV, c. 106, § 3, provides: "[W]hen any land shall have been limited by any assurance . . . to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof."

[7] 225 N.Y. 305, 122 N.E. 221 (1919).

[8] Ibid., at 312.

[9] See cases collected in 125 A.L.R. 548 (1940).

thus modified, the doctrine has been accepted as harmonious with the modern emphasis on intent as a touchstone in interpreting writings.[10]

In the New York courts the problem of determining intent in applying the *Hughes* doctrine has now become a constant source of litigation. Settlors of inter vivos trusts have continuously invoked the rule of worthier title to eliminate their heirs from the class of "beneficially interested" persons whose consent was necessary for revocation.[11] Successive cases have emphasized several different factors in deciding whether the heirs had been intended to take as remaindermen: 1) Has the settlor reserved the power to defeat the limitation to heirs by testamentary appointment?[12] 2) Has there been a "full and formal" disposition of the trust property?[13] 3) Has the settlor reserved powers to grant or assign an interest in the property during his lifetime?[14] 4) Can the property return to the settlor during his lifetime upon any contingency?[15] 5) Is the trust primarily for the benefit and enjoyment of the settlor?[16] 6) Are the purported remaindermen to be determined upon any date other than the settlor's death?[17] 7) Is a particular state designated whose laws of intestate succession would control the determination of beneficiaries?[18]

[10] "The continuance of the rule . . . as a rule of construction is justified on the basis that it represents the probable intention of the average conveyor." Rest., Property § 314 Comment a (1940).

[11] N.Y. Pers. Prop. Law (McKinney, 1938) § 23.

[12] Richardson v. Richardson, 81 N.E. 2d 54 (N.Y., 1948); Engel v. Guaranty Trust Co. of N.Y., 280 N.Y. 43, 19 N.E. 2d 673 (1939); Whittemore v. Equitable Trust Co., 250 N.Y. 298, 165 N.E. 454 (1929). Contra: City Bank Farmers Trust Co. v. Miller, 278 N.Y. 134, 15 N.E. 2d 553 (1938).

[13] Richardson v. Richardson, 81 N.E. 2d 54 (N.Y., 1948); Hussey v. City Bank Farmers Trust Co., 261 N.Y. 533, 185 N.E. 726 (1933); Whittemore v. Equitable Trust Co., 250 N.Y. 298, 165 N.E. 454 (1929). Contra: Julier v. Central Hanover Bank & Trust Co., 272 App. Div. 598, 74 N.Y.S. 2d 262 (1947), motion for leave to appeal denied 297 N.Y. 853, 78 N.E. 2d 869 (1947).

[14] Richardson v. Richardson, 81 N.E. 2d 54 (N.Y., 1948); Engel v. Guaranty Trust Co. of N.Y., 280 N.Y. 43, 19 N.E. 2d 673 (1939); Hussey v. City Bank Farmers Trust Co., 261 N.Y. 533, 185 N.E. 726 (1932); Whittemore v. Equitable Trust Co., 250 N.Y. 298, 165 N.E. 454 (1929).

[15] Richardson v. Richardson, 81 N.E. 2d 54 (N.Y., 1948); Engel v. Guaranty Trust Co. of N.Y., 280 N.Y. 43, 19 N.E. 2d 67 (1939).

[16] City Bank Farmers Trust Co. v. Miller, 278 N.Y. 134, 15 N.E. 2d 553 (1938); Berlenbach v. Chemical Bank & Trust Co., 235 App. Div. 170, 256 N.Y. Supp. 563 (1932), aff'd 260 N.Y. 539, 184 N.E. 83 (1932).

[17] Schoellkopf v. Marine Trust Co. of Buffalo, 267 N.Y. 358, 196 N.E. 288 (1935). Contra: Julier v. Central Hanover Bank & Trust Co., 272 App. Div. 598, 74 N.Y.S. 2d 262 (1947), motion for leave to appeal denied 297 N.Y. 853, 78 N.E. 2d 867 (1947); Scholtz v. Central Hanover Bank & Trust Co., 295 N.Y. 488, 68 N.E. 2d 503 (1946); Green v. City Bank Farmers Trust Co., 72 N.Y.S. 2d 442 (1947).

[18] Minc v. Chase Nat'l Bank, 263 App. Div. 141, 31 N.Y.S. 2d 592 (1941); Hopkins v. Bank of N.Y., 261 App. Div. 465 (N.Y., 1941). Contra: City Bank Farmers Trust Co. v. Miller, 278 N.Y. 134, 15 N.E. 2d 553 (1938); Green v. City Bank Farmers Trust Co., 72 N.Y.S. 2d 442 (1947).

The uncertain bearing of these factors upon the settlor's intent has led to conflicting and unpredictable results in the New York courts, and a considerable body of law has grown up around the hitherto seldom invoked rule. The attempt to qualify the doctrine of worthier title has succeeded largely in multiplying the occasions upon which litigation is necessary to determine the legal effect of the disputed limitations. There are, moreover, other results which have to be laid at the door of the *Hughes* doctrine. The English version of the rule of worthier title had, prior to its abolition, been applied only to transfers of real property. However, in the change from a rule of law to a rule of construction, the way was paved for its application to personal property as well as realty.[19] The result was that the scope of the rule has been increased considerably beyond its original ambit by the very attempt to limit it. But this broadened application has not been compensated for by increased freedom in the judicial determination of intention, since much of the same evidence of this intent ushered in by the *Hughes* doctrine had already been admissible under the English rule to prove that the grantor had meant the remaindermen to be *personae designatae* rather than technical heirs.[20]

Finally, although the courts have been nominally committed by the American rule to the search for intention, their approach hardly supports the theory that their construction reflects the transferor's intent. Although a grantor says that a limitation is to his heirs, this seemingly clear mandate will not be given effect unless further corroborated by any of a host of auxiliary circumstances, such as those required by the New York courts. When worthier title was a rule of law, the courts did not profess to be searching for the grantor's intention, but in the subsequent attempt to make such a search no reason was given why the direct words of the limitation were not to be considered sufficient evidence of the grantor's meaning.[21]

Moreover, the intention sought by the courts has commonly been that of creating a remainder or of reserving a reversion. Once this problem has been resolved, all of the grantor's rights are crystallized in toto and all of the incidents of remainders or reversions presumably attach to his grant. The notion is that the court must first decide upon the interest created before it can determine the

[19] The court in the Whittemore case, 250 N.Y. 298, 165 N.E. 454 (1929), while refusing to apply the rule to a trust of personal property, had intimated that it was applicable in a proper case. This was stated squarely in Engel v. Guaranty Trust Co. of N.Y., 280 N.Y. 43, 19 N.E. 2d 673 (1939).

[20] This is one of the significant differences from the rule as applied to devises. See 4 Kent's Comm. 506 (12th ed. by Holmes, 1873); Harper and Heckel, The Doctrine of Worthier Title, 24 Ill. L. Rev. 627 (1930).

[21] "We are aware that this conclusion antagonizes a cardinal rule in the present day construction of written instruments in that it wholly eliminates a portion of the language of the deed, to which portion due effect might readily be given." Brolaskys' Estate, 302 Pa. 439, 447, 153 Atl. 739, 741 (1931). But see Rest., Property § 314 Comment a (1940): "Where a person makes a gift in remainder to his own heirs . . . he seldom intends to create an indestructible interest in those persons who take his property by intestacy, but intends the same thing as if he had given the remainder 'to my estate.' "

rights of the parties litigating the construction of the instrument. Since the task is to search for evidence consistent with the creation of a certain kind of future interest, the future interest itself is posited as the object of the grantor's intent. The interpretive process is therefore a determination of the concept which most exactly subsumes the aggregate of incidents which have been written into the grant. The result is then labeled the grantor's "intent."

What are the particular sources of litigation in which the rule of worthier title may determine the result? The cases indicate five basic situations: 1) actions determining the rights of creditors to levy on the interest,[22] 2) actions, usually in partition, between heirs who claim as remaindermen and heirs claiming the reversion by descent,[23] 3) actions to revoke an inter vivos trust without the consent of heirs claiming to be "beneficially interested,"[24] 4) actions between subsequent conveyees or devisees of the grantor's reversionary interest and those who claim as remaindermen,[25] and 5) tax actions against the estate of the holder of the purported reversion.[26] Although a grantor's or settlor's intent as to each contingency may vary, this difficulty may be glossed over very easily by holding them all dependent upon the presence or absence of a reversionary interest. But such technique overlooks the fact that the kind of interest which has been created or reserved need necessarily be relevant in only two situations. The first is in tax actions, where the presence of a reversionary interest subjects the property to the federal estate tax;[27] the second is in the determination of creditors' rights, where the ownership of the interest must be ascertained to authorize the right to levy upon it. The other situations in which worthier title arises involve only a determination of the particular incidents attached to the grant—incidents which, if specifically enumerated, would have provided no cause for litigation.

Since a grantor may have some intention with respect to these incidents, courts which define their task in terms of a search for the intended type of future interest are, to that extent, falsifying the object of their inquiry. Evidence relevant to the problem of whether the interest in question is a remainder or a reversion may have little bearing on the particular issue being litigated. The court that emphasizes the fact that the heirs are to be determined at a date

[22] Biwer v. Martin, 294 Ill. 488, 128 N.E. 518 (1920); Doctor v. Hughes, 225 N.Y. 305, 122 N.E. 221 (1919); Whayne v. Davis, 23 Ky. L. Rep. 2174, 66 S.W. 827 (1902).

[23] Shaw v. Arnett, 33 N.W. 2d 609 (Minn., 1948); Brolasky's Estate, 302 Pa. 439, 153 Atl. 739 (1931).

[24] Notes 12–18 supra.

[25] Wilcoxen v. Owen, 237 Ala. 169, 185 So. 897 (1938); West Tenn. Co. v. Townes, 52 F. 2d 764 (D.C. Tenn., 1931); Akers v. Clark, 184 Ill. 136, 56 N.E. 296 (1900).

[26] Commissioner of Internal Revenue v. Spiegel's Estate, 159 F. 2d 257 (C.C.A. 7th, 1946), cert. den. 331 U.S. 1798 (1946); Beach v. Busey, 156 F. 2d 496 (C.C.A. 6th, 1946); Morsman v. Commissioner of Internal Revenue, 90 F. 2d 18 (C.C.A. 8th, 1937).

[27] Goldstone v. United States, 325 U.S. 687 (1945); Helvering v. Hallock, 309 U.S. 106 (1940).

other than the grantor's death, to settle the question of whether he meant to reserve powers to convey or devise the interest claimed by the purported remaindermen, may be doing grave injustice to what the grantor actually had in mind.[28]

A recent Minnesota case, *Shaw v. Arnett*,[29] provides a useful illustration. A grantor executed an inter vivos conveyance to his son for life, "with remainder in fee to his children; should he die leaving no child or children . . . , then said lands to revert to the heirs of the grantor herein."[30] After the grantor's death the life tenant died intestate and childless, leaving his widow as sole heir at law. In the suit for partition of the subject matter of the conveyance, the widow claimed her husband's intestate share on the theory that the estate reverted to the grantor by operation of the rule of worthier title. The grantor's surviving children asserted that they took a contingent remainder under the grant which vested at the life tenant's death, so that the life tenant had no interest in the fee. The court concluded that there was only one question for determination: "Did [the grantor] retain a reversion in the real estate in question after he conveyed the life estate to his unmarried son, who later married but never had children?"[31] This issue was considered to turn upon the rule of worthier title. There being no evidence of an intent to create a remainder, the interest was held to be a reversion which vested in the grantor's heirs, including the life beneficiary, upon the grantor's death.

The Minnesota court's approach to the problem made it necessary to determine whether the interest passed by purchase or descent before the court could decide the date upon which it vested. But this date was itself the only material issue of the litigation. If the date of the grantor's death controlled, the life beneficiary was included within the phrase "heirs of the grantor herein." If the date of termination of the life estate controlled, the widow could take no interest, since her husband could not be a member of the class "heirs." The problem should thus have been only to determine the grantor's intent as to this date. The clear meaning of the word "heirs" should have indicated that the grantor thought of the class in terms of the date of his death,[32] and this inquiry should

[28] The recent trend of the New York cases in refusing to consider the date upon which the heirs are to be ascertained as relevant in determining the right of revocation may imply a recognition of this possibility. Julier v. Central Hanover Bank & Trust Co., 272 App. Div. 598, 74 N.Y.S. 2d 262 (1947), motion for leave to appeal denied 297 N.Y. 853, 78 N.E. 2d 869 (1947); Scholtz v. Central Hanover Bank & Trust Co., 295 N.Y. 488, 68 N.E. 2d 503 (1946); Green v. City Bank Farmers Trust Co., 72 N.Y.S. 2d 442 (1947).

[29] 33 N.W. 2d 609 (Minn., 1948).

[30] Ibid., at 610. [31] Ibid., at 611.

[32] Rest., Property § 308 (1940). This was cited by the court but employed differently. The objection that the solution submitted merely substitutes one "rule" for another is not without force. However, the principle that heirs are determined upon the ancestor's death unless a contrary intention is expressed, has an immeasurably stronger foundation in the actual intention of the grantor than the assumption that a remainder or reversion is the object of this intent.

have been divorced from the barren question of whether he intended a reversion or a remainder. Yet this distinction was obscured by the fact that the court felt obliged to classify the future interest before it could settle the issue before it.

The effect of the doctrine of *Doctor v. Hughes* has been to cause the courts considerable embarrassment in this branch of the law of future interests. While short shrift has been made of the touchstone of intention, the difficult problems of construction introduced and their extension to personal as well as real property have served only to increase litigation. It may be that the solution to these difficulties lies in a return to the arbitrary but more predictable English version of worthier title. Intention can be furthered as much by clear rules of guidance at the drafting stage as by elastic rules of construction when litigation arises. The New York experience seems to warrant a step in this direction. Still, if intention is to be sought at all, the approach submitted has the merit of stating it in terms that are realistic. The Uniform Law Institute has proposed a third alternative giving effect to the literal words of the disputed limitation.[33] Both the latter solution and the discarded English view recognize the value of a clear and predictable rule, although this is necessarily at the expense of being somewhat arbitrary.

CONSTITUTIONALITY OF STATE EQUALIZATION OF PROPERTY ASSESSMENTS IN ILLINOIS

In two decisions involving the assessment and taxation of real property,[1] the Illinois Supreme Court recently upheld the constitutionality of the Butler Program[2] of state equalization which attempts to effect "full value" assessments in the administration of the Illinois general property tax. A definite ruling on the program's validity in relation to personal property taxation was avoided, however, by the United States Court of Appeals for the Seventh Circuit[3] on an appeal from a district court decision which had found the program, as it is presently administered, to be unconstitutional, particularly as applied in the taxation of personal property.[4]

The enactment of the Butler Program reforms in 1945 marked an important

[33] "When any property is limited, in an otherwise effective conveyance inter vivos, in form or in effect, to the heirs or next of kin of the conveyor, which conveyance creates one or more prior interests in favor of a person or persons in existence, such conveyance operates in favor of such heirs or next of kin by purchase and not by descent." Proposed Uniform Property Act § 15. But for an able defense of the present rule, see Professor Warren's article in 2 U. of Toronto L.J. 389 (1938).

[1] People v. Wasson Coal Co., 403 Ill. 30, 85 N.E. 2d 182 (1949); People v. Albert, 86 N.E. 2d 237 (1949).

[2] Ill. Rev. Stat. (1947) c. 120, §§ 627-32.

[3] In the Matter of Chicago Railways Co., 175 F. 2d 322 (C.A. 7th, 1949).

[4] In re Chicago Railways Co., 79 F. Supp. 989 (Ill., 1948).

step toward the goal of equity and consistency in the enforcement of the Illinois general property tax.[5] In accord with the principle of uniformity, the general property tax requires that all property situated in the same taxing district be taxed at a uniform rate and assessed in proportion to its value.[6] By far the most troublesome aspect of such an ad valorem tax is the process of assessment. To insure the uniform apportionment of the aggregate amount of tax liability, it is essential that assessors apply a uniform standard of valuation to all property subject to a given tax. Disparities in valuation are bound to occur, however, because of individual differences in judgment among assessors as well as the variation in rules between different assessment jurisdictions. As a practical remedy for such disparities the Illinois property tax law provides for an equalization process by which assessed valuations, initially made, in most cases,[7] by township assessors, are later revised by county boards of review. The responsibility of these boards is to discover inequities and omissions throughout their respective counties and to "equalize" the original assessments either by classes of property or by geographic areas in order to achieve county-wide uniformity of assessment.[8] The Butler Program legislation carries the equalization process one step further by providing for a state-wide equalization of county assessments as revised or equalized by the county boards of review.

[5] Allen, Full-Value Assessment Program in Illinois, 31 Bull. Nat'l Tax Ass'n 117 (1946); Bresee, The Butler Tax Assessment Bills, 35 Ill. B.J. 58 (1946); Property Tax Reform in Illinois, Business Conditions 1–4 (Fed. Res. Bank of Chicago, Aug. 1945); An analysis of the Butler Program, a report prepared by the Tax Committee of the Ill. State's Attorneys Ass'n in collaboration with the Ill. Dept. of Rev. (1946).

[6] Ill. Const. Art. 9, §§ 1, 9; Sherlock v. Village of Winnetka, 68 Ill. 530, 535 (1873); cf. Jensen, Property Taxation in the United States 160 (1931). The uniformity rule has been vehemently criticized by scholars and official bodies for its failure to reach the various types of modern wealth and its demoralizing effect upon the taxpayer. Cummings, Amending the Revenue Article of the Illinois Constitution, 29 Chi. Bar Record 259 (1948); Sears, Constitutional Revision and Party Circle Bills, 14 Univ. Chi. L. Rev. 200, 207 (1947); Ill. Const'l Conv. Bull. 239 (1920). Most of the states have abandoned the strict uniformity rule and have adopted a taxing system based on some form of property classification whereby the tax burden is adjusted as between different classes of property according to their varying capacities to pay and to evade taxes. The general belief with respect to Illinois has been that the uniformity provision of the Illinois Constitution precludes a classification system. Bachrach v. Nelson, 349 Ill. 579, 182 N.E. 909 (1932), criticized in Illinois Requirement of Uniformity in Taxation, 33 Ill. L. Rev. 57, 60–64 (1938). Recent dicta of the Illinois Supreme Court, however, are leading some authorities to the view that some form of legislative property classification might be upheld under the present constitutional provision. Compare Cummings, supra, at 261, 267; Joint Legislative Committee to Investigate Tax Problems, Report to Governor Dwight H. Green (March 2, 1945); The Constitutionality of Classification of Property for Tax Purposes in Illinois, 36 Ill. L. Rev. 796 (1942); Uniformity Required by the Illinois Constitution, 30 Ill. B.J. 300 (1942).

[7] Ill. Rev. Stat. (1947) c. 120, §§ 483, 489. In Cook County, however, which is one of the exceptions to this general set-up, there is an elected full-time *county* assessor with a staff of full-time deputies, and a two member board of appeals which performs the functions of a board of review. Ill. Rev. Stat. (1947) c. 120, §§ 487, 492.

[8] Ibid., § 589.

The need for state-wide equalization stems from the universal habit of local assessors of undervaluing property,[9] a custom originating as an attempt to minimize local contributions to state revenue.[10] This custom has continued in Illinois in spite of the fact that full value assessment has been a statutory requirement since 1927.[11] Wide disparities in local levels of fractional assessment in Illinois resulted in an inequality in the distribution of state taxes during the period when the state levied a property tax.[12] Although all property throughout the state was subject to a uniform, nominal tax rate, discrimination occurred since the *effective* rate of taxation varied according to the level of assessment valuation which prevailed in the various counties. Similar discriminations occurred with respect to property located in taxing districts overlapping two or more counties[13] and in the case of state-assessed but locally-taxed property.[14] Variance in local ratios of assessment also rendered ineffective the nominally uniform ceiling tax rates and bond limitations applicable to particu-

[9] Ill. Const'l. Conv. Bull. 233 (1920); Property Tax Reform in Illinois, Business Conditions 3 (Fed. Res. Bank of Chicago, Aug. 1945).

[10] Leland, The Classified Property Tax in the United States 18 (1928).

[11] During the period 1898–1927, the tax statutes prescribed a uniform debasement of assessments at one-fifth, one-third, and finally one-half of full value. Allen, Full Value Assessment Program in Illinois, 31 Bull. Nat'l Tax Ass'n 116, 117 (1946). Since 1927, however, the Illinois Revenue Act has stipulated a standard of "fair-cash value." This has been quite generally understood to require *full* value assessment in spite of contrary practices. Anderson v. City of Park Ridge, 396 Ill. 235, 245, 72 N.E. 2d 210, 215 (1945); People v. St. Louis Bridge Co., 357 Ill. 245, 252–53, 191 N.E. 300, 303 (1934); People v. Gillespie, 358 Ill. 40, 47, 192 N.E. 664, 667 (1934) (semble); Ill. Dept. of Rev., Illinois Assessors' Manual 14, 161 (1944).

[12] The state itself does not currently rely upon the general property tax for its own support, using in its stead the sales tax, technically known as the retailer's occupational tax. Ill. Rev. Stat. (1947) c. 120, §§ 440–53. However, the general property tax still represents, as it always has, the main source of revenue for some 14,500 local governments in Illinois. Ill. Dept., of Rev. Illinois Assessors' Manual 90 (1944).

[13] For example, in People v. Allyn, 393 Ill. 154, 65 N.E. 2d 392 (1946), the complainant was held liable for three and one-half times the amount in municipal taxes charged against similar property receiving identical services and situated within the same village but in another county merely because of the variance in assessment ratios used by the two counties: 75 per cent in Cook County and 21 per cent in Lake County.

[14] Capital stock of certain domestic corporations and railroad operating property are assessed by a state agency, currently the Department of Revenue. In Mobile and Ohio R. Co. v. State Tax Commission, 374 Ill. 75, 28 N.E. 2d 100 (1940), criticized in Labovitz, Uniformity in Illinois Property Tax, 29 Ill. B.J. 249, 278–82 (1941), and in Equalization in Railroad Assessments in Illinois, 35 Ill. L. Rev. 766 (1941), the Illinois Supreme Court held that the uniformity rule required that such property be taxed on a basis of state-wide equalization of assessment ratios regardless of any disparity from local levels of assessment in the particular counties where the property was to be taxed. This meant, for example, that the operating property of the Mobile and Ohio in 1938 was uniformly assessed at 34½ per cent of its full value while adjoining homes, farms, and other property in counties through which the railroad operated were taxed on the basis of 76, 68, 66, 65, 53, 40, and 30 per cent of their full value. Thus in all but one of these counties locally assessed property in this case was subject to higher effective rates of taxation than the state-assessed railroad property.

lar classes of taxing bodies,[15] and created discrimination in the distribution of state relief funds.[16]

In addition, the de facto power of local assessors to fix the level of assessment enabled assessing agencies to act as quasi-budget officers for all taxing districts in their respective jurisdictions,[17] and, in addition, to affect the distribution of the tax-load outside of their jurisdictions. The latter inconsistency arose under the practice of equalizing state-assessed but locally-taxed property on the basis of the state-wide weighted average of local assessment ratios.[18] The classic instance of this inconsistency occurred in 1943 when the Cook County assessment ratio was suddenly increased from 37 per cent, a ratio which had been in effect since the late twenties, to 75 per cent. Because of the tremendous influence of Cook County in the determination of an average weighted by the value of local property, the state-wide average jumped from 31 to 54 per cent. The extra-jurisdictional effect of the local decision in Cook County was to increase the tax load carried by state-assessed properties and to decrease the load carried by other taxpayers in districts outside Cook County, although its effect within Cook County was the reverse.[19] A decision to decrease the Cook County ratio would, of course, have resulted in the opposite state-wide shift in the relative burden of local taxes.

It was the announcement in 1943 by the Cook County Assessor of his intention to construe literally the statutory full-value assessment requirement which directed public attention to the foregoing problems of fractional assessment[20] and led to the enactment in 1945 of the Butler Program reforms.[21] The back-

[15] These fiscal restrictions are expressed in terms of the aggregate assessed value of local property. Maximum tax extensions and bond issues therefore varied from county to county according to the level of the local assessment ratio. Joint Legislative Tax Committee to Investigate Tax Problems, Report to Governor Dwight H. Green (March 2, 1945).

[16] Eligibility of local governments for state relief depends in part upon the level of local property tax rates for specified purposes. But since the level of tax rates is largely dependent upon the magnitude of the local assessment ratio, the amount of tax extension necessary to qualify under a uniform tax rate requirement varied in accordance with the local assessment ratio. Ibid. Allen, Advantages to School Districts of Full-Value Assessment Programs, 32 Bull. Nat'l Tax Ass'n 194, 196 (1947).

[17] Stiles, "Full Fair Cash Value" in the 1945 Illinois Equalization Program, 32 Bull. Nat'l Tax Ass'n 34 (1946); Ill. Tax Comm'n, Tax-Rate Limits and Assessment Ratios: 1925–1940, at 1 (1940).

[18] See note 14 supra.

[19] Bresee, The Butler Tax Assessment Bills, 35 Ill. B.J. 58, 60 (1946). These relationships were further altered when the Butler Program took effect in 1946. "The result was a relative shift of tax liability: *to* local assessments in the Downstate counties, *from* such assessments in Cook County. State assessments therefore secured some relief from the added load that had been placed upon them Downstate in 1943 and lost something of their gain of that year in Cook County." Property Taxes in Illinois, Illinois Property Tax News Letter No. 5, at 10 (Ill. Dept. of Rev., Prop. Tax Div., Feb. 1949).

[20] Joint Legislative Committee, op. cit. supra note 15.

[21] These reforms are embodied in Senate Bill 229, Ill. Rev. Stat. (1947) c. 120, §§ 627–32; and Senate Bill 314, Ill. Rev. Stat. (1947) c. 120, § 643a (as amended in 1947 by House Bill

bone of this program is Senate Bill 229, which directs the Department of Revenue to "lower or raise the total assessed value of property in any county . . . so that such property will be assessed at its *full* fair cash value."[22] To accomplish this objective the department is required to analyze local assessments in relation to property transfer and appraisal data and to certify appropriate percentages, known as multipliers, to the county clerks,[23] whose duty it is to apply these multipliers to the locally assessed valuations as revised and corrected by the boards of review.[24] Assessments of capital stock of certain domestic corporations and of railroad operating property remain a responsibility of the Department of Revenue, but they are to be certified to county clerks at full value.[25] In calculating tax rates and extending taxes, the county clerk is to use assessed valuations as equalized or confirmed by the department.[26] In addition, the statute provides that the "full fair cash value of all property . . . after giving effect to equalization by the Department shall be the assessed valuation *for all purposes of taxation, limitation of taxation, and limitation of indebtedness* prescribed in the Constitution or any statute."[27]

Thus, by providing the machinery of state equalization, the Butler Program legislation eliminated most of the inconsistencies and inequities arising as a result of inter-county variation in assessment ratios. It did not, however, in any way change the process or the goal of original assessment or of revision by local boards of review. The only purpose of the Butler Program was to provide a method of executing the full valuation standard in existence since 1927 on a county *average* basis. This purpose would be realized when the assessments in each county throughout the state were equalized at a uniform *average* ratio of 100 per cent of actual value. For this reason the 1945 reforms do not in any way reach whatever intra-county discrepancies may exist because of faulty assessing procedures, inter-class disparities, or geographical variations within and between townships.[28]

The validity of the state equalization program has been challenged on several

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513). Enactment of Senate Bill 314 and some eighty-five companion measures, providing for a downward revision of tax-rate limits, was made necessary because of the fact that Senate Bill 229, by raising the level of local assessments to full value, would, by itself, allow for substantial increases in local taxes.

[22] Ill. Rev. Stat. (1947) c. 120, § 627 (italics added).

[23] Ibid., § 632.

[24] Ibid., § 642.

[25] Ibid., § 632.

[26] Ibid., § 643.

[27] Ibid. (italics added).

[28] To promote uniformity in individual assessments, the Butler legislative committee had recommended an additional measure, Senate Bill 208, providing for mandatory standardized appraisal systems and for the appointment in each county of a supervisor of assessments with broad powers of control over individual assessments in his county. This bill failed of enactment because of opposition from local officials and citizens. Allen, Full-Value Assessment Program in Illinois, 31 Bull. Nat'l Tax Ass'n 116, 119 (1946).

grounds. In *People v. Albert*[29] the taxpayer argued that the Butler laws provide for a determination of assessed values by the Department of Revenue and thereby contravene the Illinois constitutional provision[30] that only persons authorized by the General Assembly shall place the value upon property to be taxed. According to the taxpayer, assessors and boards of review are the only legal entities established for the purpose of valuing real estate. The implications of this contention are, of course, erroneous: first, because the equalizing function of the department was conferred upon it by the General Assembly; and second, because the Butler Program equalization is not assessment valuation since it does not determine or change the proportionate allocation of the total tax bill within the particular assessing jurisdiction. The Illinois Supreme Court, in rejecting the taxpayer's argument, pointed out that the General Assembly has the power to determine the method by which property may be valued for tax purposes so long as it complies with the ad valorem requirement of the constitution, that every person or corporation pay a tax in proportion to the value of his, her, or its property.[31]

In *People v. Albert* the taxpayer also contended that the raising of the assessed valuation of property by the Butler Program machinery violated procedural due process in that the taxpayer was given no notice or opportunity to be heard with respect to the Department of Revenue's determination of the equalizing multiplier, or of the application of the multiplier by the county clerk to the original assessment as revised by the board of review. Relying upon well-established precedents,[32] the Illinois Supreme Court distinguished between an increase of an *individual* assessment, which is personal and requires personal notice to the taxpayer,[33] and the *equalization of assessments*, which is impersonal in that it involves a horizontal change in an entire *class* or *area* of property assessments without reference to ownership. Statutory notice in the latter case is sufficient since a requirement of personal notice to each of the large number of people whom an equalization proceeding affects would make assessment equalization "wholly impracticable and impossible" and would "prevent compliance with the constitution requiring equal taxation."[34] Illinois statutory pro-

[29] 86 N.E. 2d 237 (1949). A similar argument was made in People v. Wasson Coal Co., 403 Ill. 30, 85 N.E. 2d 182 (1949).

[30] Article IX, Section 1 of the Illinois Constitution prescribes that the valuation of property for taxation shall be "ascertained by some person or persons, to be elected or appointed in such manner as the general assembly shall direct."

[31] People v. Albert, 86 N.E. 2d 237 (1949), quoting from Anderson v. City of Park Ridge, 396 Ill. 235, 244, 72 N.E. 2d 210, 215 (1945); Accord: Adsit v. Lieb, 76 Ill. 198, 199 (1875).

[32] People v. Orvis, 301 Ill. 350, 133 N.E. 787, (1922); Adsit v. Lieb, 76 Ill. 198 (1875); Bi-Metallic Investment Co. v. State Board of Equalization of Colorado, 239 U.S. 441 (1915); Union Pac. R. Co. v. Board of Comm'rs, 35 F. 2d 785, 790 (CC.A. 10th, 1929), cert. den. 281 U.S. 734 (1929).

[33] See note 43 infra.

[34] People v. Albert, 86 N.E. 2d 237, 241 (1949), quoting from People v. Orvis, 301 Ill. 350, 361, 133 N.E. 787, 789 (1922).

visions[35] regarding the time and place of meeting of the Department of Revenue and the period during which the department is to act as a board of equalization of assessments were held to constitute sufficient notice of the department's equalization proceedings and of the implied right of the taxpayer to appear before and be heard by the department.[36]

The decision of the federal court of appeals in *In the Matter of Chicago Railways Co.*[37] was also based on the question of notice, this time, however, with respect to the original assessment. The trustee in reorganization of the Chicago Street Railways had returned a schedule of the personal property of the debtors at full value as required by the law.[38] The court found that the Cook County Assessor had failed to reduce this full value schedule by the 30 per cent debasing factor prevailing in Cook County with respect to corporate tangible personal property assessments,[39] and, further, that he had improperly increased the aggregate valuation by including items which were not the property of the debtors and by arbitrarily reducing the rate of depreciation claimed by the taxpayer—all this without timely notice to the taxpayer.[40] The court of appeals affirmed the district court's findings that the original assessment was abritrary and discriminatory and thus in violation of the Illinois constitutional requirement of uniformity and equality, and that it was so in excess of real value as to be fraudulent. In upholding the district court's denial of the state's claim for recovery of a balance of taxes due,[41] the court of appeals expressly refused to rule on any question related to the Butler laws or to the Department of Revenue's multiplier. Instead, the court reasoned that an excessively fraudulent original assessment[42] coupled with lack of personal notice by

[35] Ill. Rev. Stat. (1947) c. 127, §§ 17, 18, and c. 120, §§ 609, 653.

[36] People v. Albert, 86 N.E. 2d 237 (1949). Accord: Adsit v. Lieb, 76 Ill. 198 (1875); Bi-Metallic Co. v. Colorado, 239 U.S. 441 (1915); Baker v. Paxton, 29 Wyo. 500, 215 Pac. 257 (1923). Contra: Northwestern Bell Telephone Co. v. State Board of Equalization and Assessment, 119 Neb. 138, 227 N.W. 452 (1929).

[37] 175 F. 2d 282 (C.A. 7th, 1949). [38] Ill. Rev. Stat. (1947) c. 120, § 528 et seq.

[39] The Illinois courts have long recognized that the statutory requirement of full-value assessment is not followed. They have therefore held that under the constitutional mandate of uniform taxation, all taxable property within a particular assessment jurisdiction must be uniformly undervalued even though the statutory requirement will thus be violated. Peoples Gas Light & Coke Co. v. Stuckart, 286 Ill. 164, 121 N.E. 629; authorities cited note 11 supra.

[40] In an analogous case, People v. Commonwealth Edison Co., 376 Ill. 70, 73, 32 N.E. 2d 902, 904 (1941), the Illinois Supreme Court held that a reduction by an assessor of a claimed depreciation of personal property without inspecting the property or otherwise checking it was "arbitrary guesswork, lacking in required uniformity and amounting to fraud in law."

[41] In re Chicago Railways Co., 79 F. Supp. 989 (Ill., 1948).

[42] Although the general rule in Illinois is that assessments are not subject to judicial review, the courts have held that an assessment may be so grossly excessive as to amount to "constructive" fraud. People v. Stewart, 315 Ill. 25, 145 N.E. 600 (1924). The rule as to "constructive" fraud has been summarized in the following language: "[W]here the evidence clearly establishes that a gross overvaluation of property has been made under circumstances showing that the actual value of the property was not considered, and that the recognized standards

pamphlet as required by the Illinois Revenue Act with respect to Cook County practice[43] were sufficient, under Illinois law, for denying the state's claim. Lack of notice was crucial in this case since it deprived the taxpayer of an opportunity to avail himself of the statutory remedies[44] available for the correction of discriminatory and fraudulent assessments.

The taxpayer in the *Chicago Railways* case had also challenged the propriety of applying the Department of Revenue's equalizing multiplier to personal property assessments, claiming that the exclusive use of real estate transfer data in the derivation of the multiplier invalidated its application to personal property valuations and produced an equalized assessment that had no relation to the actual value of the personal property. This attack is related to the stand of the taxpayer in *People v. Wasson Coal Co.*,[45] although in that case no complaint was made with respect to either the original assessment of real estate or the derivation of the multiplier, the taxpayer claiming only that application of the multiplier to the original assessment increased the valuation

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by which the value of the property is determined were not taken into consideration or applied in fixing the valuation of the property, the valuation for assessment so fixed is subject to review by the courts." People v. Wilson, 367 Ill. 494, 497, 12 N.E. 2d 5, 6 (1937).

As has been observed by one writer, "It is impossible to draw any general conclusions as to what the court will or will not consider to be overvaluation gross enough to constitute constructive fraud. About all that can be done is to indicate what has been done in the past and let the figures speak for themselves." The Illinois Constitutional Requirement of Uniformity in Taxation, 33 Ill. L. Rev. 57, 68 n. 60 (1938). Cases going both ways, and the amounts at issue, are collected in the latter citation. The author's statement that "proof of actual fraud has today been largely supplanted by an inquiry as to the degree of overvaluation," is borne out by the approach of the Supreme Court in the recent case of People v. Turk, 391 Ill. 424, 63 N.E. 2d 513 (1945).

[43] The Illinois Revenue Act provides for publication of assessments by newspaper or in pamphlet form. Ill. Rev. Stat. (1947) c. 120, §§ 584-85. In cities of more than 500,000 population, the statute contemplates publication by pamphlet, directing that a copy of the pamphlet be mailed by the county assessor to every person listed therein. Ibid., §§ 589, 597. Strict compliance with all such notice provisions is considered to be of the utmost importance since actual or constructive notice in time to seek relief are essential to due process. Where a board of assessors deliberately and intentionally refused to publish an assessment list whereby the taxpayer would have been provided with constructive notice of the amount at which his property was assessed, the Illinois Supreme Court held that a court of equity might enjoin the "fraudulent" assessment there involved since the assessing authorities had defeated the taxpayer's remedy of administrative appeal. Aldrich v. Harding, 340 Ill. 354, 172 N.E. 772 (1930). And in Carney v. People, 210 Ill. 434, 71 N.E. 365 (1904), it was held that whereas constructive notice by publication of the list of original assessments plus provision for a hearing before a board of review met the due process requirement, personal notice plus an opportunity to be heard is essential in the case of an original assessment by the board of review of omitted property since the published list of original assessments gave no notice to a taxpayer whose property was omitted. Likewise, after a taxpayer's valuation has been accepted by an assessor, any increase in the valuation by a supervisor of assessments, St Louis Merchants' Bridge Co. v. Eisele, 263 Ill. 50, 104 N.E. 1013 (1914), or by a board of review, Cox v. Hawkins, 199 Ill. 68, 64 N.E. 1094 (1902), requires personal notice.

[44] The Illinois Revenue Act provides for review of original assessments by the board of review upon complaint that an assessment is incorrect. Ill. Rev. Stat. (1947) c. 120, §§ 589, 594.

[45] 403 Ill. 30, 85 N.E. 2d 182 (1949).

far beyond its full fair cash value. The Illinois Supreme Court disposed of this attack by pointing out that since all assessments in the county had been multiplied by the same multiplier, the complainant's equalized assessment bore the same relation to all other equalized assessments within the county as had obtained before the application of the uniform multiplier and that, therefore, the taxpayer's relative tax liability position had not been prejudiced by the Butler Program equalization process. The fault, if any, was in the original assessment and the taxpayer's right to a hearing was thus limited to the period allotted by statute for appeals to the board of review.

Left unanswered by the foregoing opinion is the question raised by the taxpayer in the *Chicago Railways* litigation; that is, whether a multiplier derived exclusively from real estate data may properly be applied in equalizing personal property assessments. The federal district court had held that where the application of such a multiplier to personal property values resulted in an excessive equalized assessment, the tax on the excess over full fair cash value was invalid.[46] As pointed out above, the court of appeals refused to rule upon any issue related to the Butler Program or the Department of Revenue's multiplier, but instead rested its decision upon lack of notice with respect to a discriminatory and fraudulent *original* assessment.[47] In the *Wasson Coal Co.* case, the Illinois Supreme Court noted the decision of the district court in the *Chicago Railways* case, but distinguished it as involving an equalization of personal property.[48] Actually, however, application of a multiplier derived from a sample of real estate values to personal property is no less valid than its application to assessments of realty. The multipliers certified by the Department of Revenue to county clerks are the reciprocals of local assessment ratios determined by a sampling technique known as the real estate sales-ratio method.[49] This method uses ratios obtained by comparing the assessed values of particular parcels of realty to their sales prices as disclosed by county records of bona fide sales. A basic assumption underlying the use of this method is that real estate which is bought and sold on the market is fairly representative of *all* property subject to assessment.[50] Since the sample does not include any items of personal property, it cannot be said to furnish any direct indication as to the average assessment ratio applicable to personalty. For the same

[46] 79 F. Supp. 989 (Ill., 1948).

[47] In the Matter of the Chicago Railways Co., 175 F. 2d 282 (C.A. 7th, 1949).

[48] 403 Ill. 30, 40 85 N.E. 2d 182, 187 (1949).

[49] Illinois Property Tax News Letter No. 4, at 14 (Ill. Dept. of Rev., Prop. Tax Div., June 1948); Stiles, op. cit. supra note 17, at 42. Of the three possible measurements of nonuniformity, viz., sales ratios, appraisal ratios, and capitalized earnings ratios, the sales-ratio method, supplemented perhaps by some expert appraisals, seems to be the most practical for purposes of state equalization because of its features of objectivity and administrative feasibility. The sales-ratio method is discussed in Mitchell, Using Sales Data to Measure the Quality of Property Tax Administration, 1 Nat. Tax J. 330, 333 (1948); Stiles, op. cit. supra note 17, at 41–43; Ill. Tax Comm'n, Tax Rate Limits and Assessment Ratios: 1925–1940, at 2–13 (1940).

[50] Stiles, op. cit. supra note 17, at 42.

reason, it is subject to some attack as an *over-all* index of the level of county assessments. However, inasmuch as real estate far exceeds personalty in the local tax base,[51] whatever error results from deriving an over-all county average ratio from real estate data is, probably, at least from a pragmatic point of view, not statistically significant for purposes of state-wide equalization.[52]

The question of whether the real estate sales-ratio method adequately estimates the average county assessment ratio is to be distinguished from the question in the *Chicago Railways* case as to whether application of an equalizing multiplier derived exclusively from real estate transfer data to a tangible personal property assessment operates to prejudice the relative tax liability position of the taxpayer. A consideration of the interrelation of assessments, tax rates, and tax charges indicates that the answer to the latter question is a definite "no." A uniform tax rate is computed by the county clerk by dividing each levy[53] amount, after allowing for loss and cost, by the aggregate assessed valuation of property in the particular taxing district.[54] In extending taxes the county clerk multiplies each assessment by the uniform tax rate and thus determines the amount of taxes to be charged against each item of property. Prior to the Butler laws, the county clerk extended taxes on assessed valuations as equalized by the county board of review and on railroad and capital stock assessments made and certified by the Department of Revenue.[55] Under the current statutory provisions the county clerk, before extending the tax, applies the multiplier certified by the Department of Revenue to each individual assessment as equalized by the county board of review. The effect of this operation is to increase the aggregate assessment to be divided into a given tax levy in computing the tax rate, thereby obtaining a tax rate lower than that which would have resulted had no multiplier been used. However, extension of

[51] In 1947, real estate represented approximately 80 per cent and personalty approximately 20 per cent of the total property tax base in Illinois subject to state equalization. These percentages are derived from statistics published in Illinois Property Tax News Letter No. 5, at 11, A11 (Ill. Dept. of Rev., Prop. Tax Div., Feb. 1949).

[52] This statement is made particularly in view of the practical problems involved in obtaining objective assessment ratios of many types of personal property and in view of the confusion in local assessment policies concerning the taxation of personalty. In some counties, notably Cook, the effort to reach intangibles has led to publicly promulgated "de facto" classification whereby intangibles are assessed at lower percentages of full value than other kinds of property. Ill. Dept. of Rev., Illinois Assessors' Manual 162–63 (1944); Ill. Tax Comm'n, Tax-Rate Limits and Assessment Ratios: 1925–1940, at 15–19 (1940). See note 6 supra on the constitutional question concerning property classification in Illinois.

[53] The tax levy is the amount of money that the corporate authorities of a taxing district have voted as the amount they desire to have raised for the current year from property taxes spread against the assessed valuation of property within that taxing district. Ill. Tax Comm'n, Tax-Rate Limits and Assessment Ratios: 1925–1940, at 23 (1940).

[54] If the computed rate should exceed the legal rate limit imposed by statutes restricting the local taxing power, only the statutory maximum rate may be extended even though this will yield less than the levy amount. Ill. Rev. Stat. (1947) c. 120, § 643; Ill. Tax Comm'n, Tax-Rate Limits and Assessment Ratios: 1925–1940, at 29 (1940).

[55] Ill. Tax Comm'n, Tax-Rate Limits and Assessment Ratios: 1925–1940, at 30 (1940).

this uniform lower tax rate to a series of individual assessments, each uniformly increased by a constant multiplier, yields exactly the same amount of tax liability with respect to each assessment, disregarding any effect of tax rate limits, as that which would be obtained by extending against each original assessment the higher tax rate which would have resulted had the aggregate of the original assessments been divided into the same amount of tax levy. This would hold true no matter how the uniform multiplier had been derived and regardless of its relation to the assessments to which it might be applied.[56] The application of any constant multiplier to each individual assessment will magnify in an absolute sense any disparity in individual assessments, but it will not change the proportionate liability of one assessment to another or to the county average.[57]

The rationale of the *Wasson Coal Co.* case is thus equally applicable to real or personal property assessments. The assessment issue, in any case in which it is argued that an assessment, as equalized under the Butler Program machinery, is in excess of full fair cash value, reduces to a question of whether the original rather than the equalized assessment represents a fair valuation in relation to all other original assessments in the taxing district. It would thus appear that, had the Court of Appeals chosen to rule on the Butler Program in the *Chicago Railways* case, the disposition of the case should have been the same—an inquiry into the facts of the original assessment.

VOTING TRUSTS UNDER THE ILLINOIS BUSINESS CORPORATION ACT

Section 30a of the Illinois Business Corporation Act permits the use of voting trusts in the management of corporations,[1] but limits the duration of such trusts

[56] It should be observed, however, that this identity of tax charges results only where *all* assessments have been equalized by the *same* constant multiplier. It does not, therefore, necessarily obtain in the case of a taxing district which overlaps two or more county boundaries or in the relative distribution of taxes as between state-assessed and locally assessed property. But, as has been observed, the Butler Program was designed to effect changes in just these instances by eliminating the variation in average assessment levels as between counties and as between locally assessed and state-assessed property.

[57] The Full-Value Assessment Program: An Analysis of the Butler Program, a report prepared by the Committee of the Ill. State's Att'ys Ass'n in collaboration with the Ill. Dept. of Rev., at 5 (1946).

[1] The constitutionality of voting trusts in Illinois is not settled. Article XI, Section 3 of the Illinois Constitution requires that each stockholder have the right to vote for directors, and in Luthy v. Ream, 270 Ill. 170, 110 N.E. 373 (1915), the Illinois Supreme Court held that voting trusts separate stock ownership from corporate control and are thus repugnant to the constitutional provision. However, the Supreme Court in two subsequent cases distinguished Luthy v. Ream on the grounds that there is no separation of ownership from control where a corporation issues stock directly to voting trustees instead of to the stockholders who then confer them upon the trustees. Rittenberg v. Murnighan, 381 Ill. 267, 44 N.E. 2d 913 (1942);

to "a period of not to exceed ten years."[2] By providing a means for voting stock as a unit large enough to control a corporation, voting trusts are potentially both useful and harmful. They may assure the retention of expert management and provide stability demanded by prospective creditors, but they also weaken stockholder control over management.[3] Section 30a represents the legislative conclusion that voting trusts of limited duration are not so harmful as to justify restriction on freedom of contract.

Practical application of the section will require clarification of the effect and definition of an excessively long trust. The language of Section 30a, legalizing trusts which do not exceed ten years, fails to specify whether an excessively long trust is to be invalidated entirely or only for the period beyond ten years.[4] In resolving this ambiguity, the courts will be faced with a variety of clauses limiting trust durations. A trust of indefinite duration (such as one created for the life of A) will present a problem only if the courts decide entirely to invalidate overly long trusts. The statutory language may well permit the courts to uphold such a trust until it becomes certain that it will not actually terminate within the prescribed period. Under either view of the effect of excessive length, difficulties are raised by trusts which are limited to ten years or less but are renewable upon the happening of some condition. The simplest example is a trust to last for ten years unless the trustees, in their sole discretion, decide to extend it. Since this would give the trustees and those they actually represent complete control over the trust's duration, this trust should be treated like one created to last indefinitely. Many trust agreements subject the trustees' determination to ratification by the beneficiaries, requiring either affirmative approval by a certain percentage of the certificate holders or else the absence of a specific percentage of dissents. The effectiveness of this control is questionable

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Babcock v. Chicago Rys. Co., 325 Ill. 16, 155 N.E. 773 (1927). The tenuous nature of this distinction indicates that the court may overrule Luthy v. Ream in an appropriate future case. The Validity of Stockholders' Voting Agreements in Illinois, 3 Univ. Chi. L. Rev. 640 (1936).

[2] Ill. Rev. Stat. (1947) c. 32, § 157.30a provides, "Any number of shareholders of a corporation may create a voting trust for the purpose of conferring upon a trustee or trustees the right to vote or otherwise represent their shares, for a period of not to exceed ten years, by entering into a written voting trust agreement specifying the terms and conditions of the voting trust, and by transferring their shares to such trustee or trustees for the purposes of the agreement."

[3] The control which shareholders surrender by entering into a voting trust is the right to elect or vote against directors and to veto various extraordinary transactions. Ballantine, Voting Trusts, Their Abuses and Regulation, 21 Tex. L. Rev. 139 (1942). Realistically, the surrender of this right in large corporations is not a serious loss. Berle and Means, The Modern Corporation and Private Property, c. v. (1947).

[4] There is authority for making the choice of the alternatives depend on the nature of the law prior to the enactment of a voting trust limitation. If voting trusts were valid at common law, then the effect of their exceeding the statutory period should be to cut down the duration to the proper length. If they were invalid independently of the statute, then their exceeding it should invalidate them entirely. 38 Col. L. Rev. 508 (1938), noting Perry v. Missouri-Kansas Pipe Line Co., 22 Del. Ch. 33, 191 Atl. 823 (1937). This approach would be difficult in Illinois where the validity of voting trusts has never been entirely certain.

in view of the familiar apathy of stockholders in corporate voting. Thus an agreement permitting the trustees to extend unless 95 per cent of the beneficiaries object within a limited time would in practice be identical with a provision for extension based on the trustees' sole discretion. Similarly, where ratification is by affirmative approval the trustees can always count on the tendency of stockholders to go along with management. Requirements for a lower percentage of objectors or a higher proportion of affirmations may furnish a more realistic basis for beneficiary ratification. But the statute's ten-year limitation is not so phrased that the courts can vary its applicability according to the degree of control the beneficiaries have over the trustees. Although it is questionable whether the courts will hold limited but renewable trusts void ab initio, it seems likely that extensions will be held invalid.

Nothing in the wording of the statute, however, prevents some or all of the beneficiaries from creating a new trust on the expiration date of the old.[5] And in many cases, instead of going through the formality of regaining their shares and again conferring them upon trustees, the beneficiaries who want a new trust may agree to extend the old one. Whether the courts will construe such an act of extension as equivalent to an act creating a new trust depends on the nature of the trust agreement's requirements for extension. If the trustees may extend subject to ratification by the beneficiaries' failure to object, permitting an extension would seem contrary to the statutory language and policy. For recognizing a duty of the beneficiaries to speak would give legal significance to the trust agreement and the relationships created thereby for a period beyond ten years. Where affirmative votes are required, the assenters have manifested a desire to have trustees continue to vote their shares. However, in *Russ v. Blair*,[6] where an extension of a voting trust not subject to Section 30a was held contrary to the trust agreement, the Illinois Supreme Court did not consider whether the assenters' affirmative votes could create a new trust as to them alone. And in consolidating this case with another in which an extension was based on the absence of dissents,[7] the court failed to distinguish the situations.

By contrast, the concurring opinion in the Ohio case of *Bechtel v. Rorick*[8] would only give effect to a purported extension by binding the assenting beneficiaries to a new trust. Further illustrating this approach, a Delaware statute which limits the duration of voting trusts contains a provision permitting assenting beneficiaries to continue a trust.[9] An objection to the Delaware and Ohio viewpoint is that an assenter may not want to participate in a new or

[5] The statute limits only the duration of a trust, not the shareholders' right to create it. "Any number of shareholders of a corporation may create a voting trust . . . for a period of not to exceed ten years. . . ." Ill. Rev. Stat. (1947) c. 32, § 157.30a.

[6] 330 Ill. App. 571, 71 N.E. 2d 838 (1947).

[7] Olson v. Rosseter, 399 Ill. 232, 77 N.E. 2d 652 (1948).

[8] 65 Ohio App. 455, 464, 30 N.E. 2d 451, 455 (1939).

[9] Del. Rev. Code (1935) § 2050.

extended trust unless it is likely to retain corporate voting control. The courts can remedy this difficulty by permitting the beneficiary to revoke if the trust does not maintain formal control. Or perhaps, in view of the occasional need for extraordinary majorities in ratifying corporate acts, the courts should not recognize a new trust unless the extension solicitations have expressly warned the beneficiaries of this consequence.

A more serious problem is that assents to an extension may result from a mistaken approval of the trustees' conduct by misled or poorly informed shareholders. When the voting trustees seek approval of an extension, they are under a fiduciary duty to make full disclosure of material facts to the certificate holders.[10] However, the protection thus afforded cannot always be relied upon. If some of the beneficiaries rather than the trustees organize an extension, there may be no duty to disclose.[11] Again, enforcement of the duty depends on the alertness of the beneficiaries and their willingness to undertake litigation. Finally, there are no definitive cases setting forth the substantive requirements for full disclosure in connection with extensions.[12] To remedy this, the legislature could adopt full disclosure requirements[13] and possibly set up an administrative agency to enforce them. Yet the disclosure problems in voting trust extensions are neither so unique nor so difficult that the legislature would be justified in singling out this area of the law for special treatment.

The analysis of Section 30a is incomplete without reference to a recent Illinois case. In *Plast v. Metropolitan Trust Co.*,[14] which involved a business trust, the trust agreement required termination "in any event" within ten years, and it gave the trustees a power of sale. Before the expiration of the period, the trustees organized and took control of a corporation which was to "purchase" the trust property, exchanging one share of its stock and one of its income bonds for each certificate of interest in the old trust. The stock, however, was to be deposited in a voting trust under unchanged control.

[10] Olson v. Rosseter, 330 Ill. App. 304, 71 N.E. 2d 556 (1947); Russ v. Blair, 330 Ill. App. 571, 71 N.E. 2d 838 (1947); see Shapiro v. Chicago Title & Trust Co., 328 Ill. App. 650, 66 N.E. 2d 731 (1946).

[11] The Illinois Appellate Court has held that the beneficiaries of a voting trust are not in a fiduciary relationship with each other and owe each other no duty of disclosure in self-dealing. Krensky v. De Swarte, 335 Ill. App. 435, 82 N.E. 2d 168 (1948). If applied to voting trust extensions, this doctrine would permit the trustees to evade their disclosure duties by secretly inducing a beneficiary to organize the extension. Such collaboration, however, is ordinarily a breach of the trust duties of both the trustee and the beneficiary. 1 Bogert, Trusts and Trustees § 191 (1935). The Krensky case should either be overruled or held inapplicable to extensions.

[12] The Illinois cases have recognized a duty to disclose but have not defined the disclosure necessary for extensions. Cases cited note 11 supra.

[13] The legislative definition might require information of the following matters: (1) revocability of the trust, (2) parties whom the trustees or other solicitors actually represent as agents, (3) the corporate interest of the trustees and other key persons, (4) compensation of the trustees, and (5) financial statements.

[14] 401 Ill. 302, 82 N.E. 2d 155 (1948).

In approving this deal as a "sale" within the meaning of the agreement, a majority in the Illinois Supreme Court ignored the transaction's manifest purpose —continuation of control in the hands of the same trustees.[15] Since the provision for termination in any event within ten years is analagous to Section 30a's ten-year limit, the Supreme Court's failure to invalidate the arrangements of the *Plast* case sets up spurious sales as the pattern for circumventing the statutory prohibition. However, a greater awareness of the actual objectives of such transactions might result in rejection of the *Plast* case. It could, moreover, be distinguished from cases under Section 30a because its time limitation was contractual.

AN AMERICAN LEGAL DILEMMA—PROOF OF DISCRIMINATION

The control of discrimination through legal sanctions is a two-fold process: (1) the enactment of anti-discrimination measures; (2) the enforcement of these measures. While in the past primary emphasis has been given the former, with the passage of anti-discrimination laws in a growing number of states, the enforcement factor is of an immediate and growing importance.[1] Essential to the enforcement process is proof of discrimination in individual cases. It may well be that in a large sense the success or failure of combating discrimination through legal devices will ultimately depend upon the evidentiary proof which can be achieved in individual cases.

While effective enforcement demands proof of discrimination in individual cases, that an act has been discriminatory is not in all cases susceptible of clear and certain demonstration. Thus if the requirements of proof are made too rigorous, effective enforcement will not be achieved. On the other hand, lax requirements of proof may result in erroneous findings of discrimination and in unjustified limitations of free choice. At both the enactment and the enforcement stages in the legal control of discrimination the ideal of equality, upon which anti-discrimination measures are based, is in conflict with the equally fundamental ideal of free choice. When an anti-discrimination law is enacted it has been decided that the societal demands of equality justify a certain limitation on free choice. But that limitation of free choice which results from an erroneous finding of discrimination is not justified by the legislation.[2] Because

[15] Contrast the dissenting opinion of Judge Gunn, ibid., at 317, 162.

[1] For example FEP Acts: N.Y. Executive Law (McKinney, Supp. 1948) c. 23, §§ 125–36; Conn. Gen. Stat. (1949) §§ 7400–7; 1 Mass. Ann. Laws (Supp. 1948) c. 6, § 56; N.J. Rev. Stat. (Supp. 1937) tit. 18, c. 25, §§ 1–28; N.M. S. 45, 19th Assemb., Reg. Sess. (March 17, 1949); R.I. H. 539, Gen. Assemb. 1949, Reg. Sess. (April 1, 1949); Ore. S. 235, 45th Assemb., Reg Sess. (March 21, 1949); Wash. S. 12, 21st Assemb., Reg. Sess. (March 19, 1949). Housing: Ill. Rev. Stat. (1947) c. 67½, § 82; Ind. Stat. Ann. (Burns, Supp. 1947) § 48-8503(b); Pa. Stat. Ann. (Purdon, 1949) tit. 35, § 1711(8). For an extensive bibliography see Graves, Anti-Discrimination Legislation in the American States (1948).

[2] The limitation of free choice and the dangers of an erroneous judgment are not, of course, unique with anti-discrimination measures. The outlawing of any action will serve to limit free

of the difficulty of proving with certainty that an act has been discriminatory, the question arises whether the desire for effective enforcement of anti-discrimination measures can be reconciled with a zealous regard for freedom of choice. The following discussion of the elements of proof, the means of proof, and the burden and precision of proof of discrimination are concerned with finding an answer to this question.

I. Elements of Proof

In a sense all actions involving choice or selection are acts of discrimination.[3] Unjustifiable discrimination is a choice or selection based on an arbitrary, unreasonable, or otherwise undesirable standard.[4] The use of a particular standard as a basis of choice may be outlawed by the Constitution or by statute,[5] or a standard may be held to be arbitrary or unreasonable in a particular case by a court.[6] Our present concern is not with whether certain standards should be outlawed, but with the problem of proving that an already outlawed standard has been used in an individual case.

The problem of proving the use of any one standard remains essentially the same in all cases, whether, for example, the standard be race, union membership, or political affiliation. In the main, however, attention will be directed toward cases of discrimination based on race, religion, or national origin. The prevalence of these types of discrimination and the growing efforts to remedy them justify this limitation in scope.

In thus restricting the scope, however, it becomes necessary to distinguish discrimination from prejudice. Although there can be no doubt that discrimination and prejudice are sociologically interrelated,[7] as matters of legal proof they are conceptually separable. Individual prejudice is a mental attitude, the probable but not the necessary consequence of which is social action. Discrimination, on the other hand, is in itself a social act, motivated in some cases by

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choice, and the dangers resulting from an erroneous judgment are inherent in the enforcement thereof. The peculiar problem involved in anti-discrimination enforcement arises because of the difficulty of proof that an individual act has been discriminatory.

[3] While the courts may speak of both justifiable and unjustifiable discrimination, the connotation of the word in the present context and its function as a legally operative concept would seem to make it more useful to describe a selection as discriminatory only when the standard upon which it is based is unjustifiable.

[4] In the case of the "separate but equal" doctrine as applied to public facilities, while an arbitrary standard is being used in separating Negroes and whites, in theory the use of the standard causes no injury because the facilities are theoretically equal.

[5] For example, U.S. Const. Amend. 15, § 1, outlawing the denial of the right to vote because of race, color, or previous condition of servitude. See statutes cited note 1 supra.

[6] See Truax v. Raich, 239 U.S. 33 (1915), determining the constitutionality of a statutory classification on the basis of reasonableness.

[7] MacIver, The More Perfect Union 13 (1948). In the broadest sense it can be said that group prejudice is the cause of discrimination.

the actor's prejudices, but in other cases by different considerations.[8] This is to say that proof of prejudice alone is neither sufficient nor necessary in order to prove discrimination.[9] This in turn is a corollary to the more general proposition that discrimination may exist independently of malice or intention to discriminate.[10]

Nevertheless, the essential element of discrimination in its legal context is the mental process of the alleged discriminator. An employer who decides to hire a white rather than a Negro stenographer has made a choice adversely

[8] See McWilliams, Race Discrimination and the Law, 9 Sci. & Soc. 1 (1945), for a discussion of the distinction between prejudice and discrimination as it affects legal efforts to control the latter.

[9] For example, an employer may be violently anti-Semitic and nevertheless keep his business affairs free from his personal prejudices. In setting up his hiring policies he will conscientiously make certain that only objective criteria are used. Proof of the employer's anti-Semitism by a rejected Jewish job applicant is material to the issue of discrimination only if the causal relation between the prejudice and the refusal to hire the applicant can be demonstrated. On the other hand, an employer who fires all Negroes because of a threatened strike has discriminated although he may be free of any personal prejudice. The New York Anti-Discrimination Commission, hereinafter referred to as SCAD, has held that an employee's refusal to obey the Anti-Discrimination Law by threatening to strike or quit if Negroes are employed can be brought before the commission by the employer as a violation of the Anti-Discrimination Law. SCAD Annual Report (1948); cf. Clover Fork Co., 4 N.L.R.B. 202 (1937), enforced Clover Fork Co. v. NLRB, 97 F. 2d 331 (1938) (employer's discharge of an employee at the request of other employees with anti-union views who threaten to leave their jobs if union employees are retained is a discharge for an anti-union motive.)

Under the Wagner Act § 8(3), 49 Stat. 449 (1935), 29 U.S.C.A. § 158(3) (1947), the NLRB in considering discrimination on the basis of union activity had said that if a discharge or refusal to reinstate was shown coupled with a background of anti-union activity and bias on the part of the employer, the presumption would be that the employer's actions were discriminatory, and the employer then had the burden of showing that his actions were not based on the employee's union activities. Upheld in NLRB v. Remington Rand, 94 F. 2d 862 (C.C.A. 2d, 1938); NLRB v. Kentucky Fire Brick Co., 99 F. 2d 89 (C.C.A. 6th, 1938); NLRB Third Annual Report 81–82 (1939). See Ward, Proof of "Discrimination" Under the National Labor Relations Act, 7 Geo. Wash. L. Rev. 797 (1939), for a discussion of the general evidence used to show anti-union bias. This included anti-union statements made by the employer. It would appear that Section 8(c) of the Labor-Management Relations Act of 1947, 61 Stat. 140 (1947), 29 U.S.C.A. § 158(c) (Supp. 1948), prohibits use of such statements. See Conference Report, H.R. Rep. 510, 80th Cong., 1st Sess., at 45 (1947). The situation differs from discrimination on the basis of race, religion, or nationality in that whereas employers and unions were often engaged in open conflict, thus giving rise to anti-union activity, the employer who discriminates on the basis of race, for example, usually has no relationship with the members of the discriminated group, or if there is a relationship, the group discriminated against is seldom sufficiently organized to create open conflict.

[10] The SCAD has held that while intention to discriminate is not an essential element of a violation of the Anti-Discrimination Law, the good faith of the respondent will be considered in determining what affirmative action should be taken. SCAD Annual Report 67–68 (1948). Some courts in considering the discriminatory selection of jurors have said that evidence that no discrimination had been intentionally practiced would support the finding of no discrimination. State v. Middleton, 207 S.C. 478, 36 S.E. 2d 742 (1946). See cases collected in 1 A.L.R. 2d 1291, 1300 (1948). Such a view, however, seems to be contradictory both to the nature of discrimination and the doctrine of the Supreme Court. Smith v. Texas, 311 U.S. 128, 132 (1940). "If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand."

affecting the Negro. But the choice is in itself not discriminatory unless race is a consideration in the formulation of that choice. It is in identifying these mental processes in individual cases that legal proof of discrimination can be distinguished from its sociological counterpart. The sociologist, whose primary interest is group behavior, is not concerned with whether single actions within a total behavior pattern are themselves acts of discrimination. He looks primarily to the social effects of the general pattern to determine whether the pattern is discriminatory.[11] In dealing with the unequal treatment of Negroes and whites in a particular region, community, or industry, the sociologist has a collection of single instances of unequal treatment from which he may detect race as the single element always accompanying the unequal treatment. Thus by an inductive process he may conclude that race, the common element in one group as well as the distinguishing element between the groups, is the cause of the unequal treatment.[12] The lawyer, on the other hand, because he is, in many cases, forced to deal merely with a single instance of unequal treatment is deprived of other instances with which he can make a comparison. As a result he must look directly to the mental processes of the alleged discriminator in order to determine whether there has been discrimination. The question arises, and will subsquently be considered, whether the law in dealing with cases of group discrimination may make use of an inductive process similar to that used by the sociologist.[13]

It is clear that discrimination, in its legal sense, may be directed toward and injure either a group or single individual. Discrimination against a group will in most cases result from a general discriminatory practice, while discrimi-

[11] See, for example, Myrdal, An American Dilemma (1944), with particular notice directed toward Appendix 6, as an illustration of this point.

[12] Mill, A System of Logic—Ratiocinative and Inductive 280 (8th ed. 1904): "First Canon—Method of Agreement. 'If two or more instances of the phenomenon under investigation have only one circumstance in common, the circumstance in which alone all the instances agree, is the cause (or effect) of the given phenomenon.' Second Canon—Method of Differences. 'If an instance in which the phenomenon under investigation occurs, and an instance in which it does not occur, have every circumstance in common save one, that one occurring only in the former; the circumstance in which alone the two instances differ, is the effect, or the cause, or an indispensable part of the cause, of the phenomenon.' "

[13] Although the objectives of the sociologist and the lawyer may differ, this does not necessarily mean that the lawyer cannot make use of the sociological techniques for discovering the facts which tend to establish discrimination. Thus, the case study, historical method, the schedule and questionnaire, and all of these used in conjunction with a statistical analysis may become useful legal tools in many cases. See Lundberg, Social Research (1942) for a discussion of these techniques. See Content Analysis—A New Evidentiary Technique, 15 Univ. Chi. L. Rev. 910 (1948), for a discussion of the legal use of a psychological and sociological method in proving prejudice. One difficulty which often may arise for the lawyer, particularly in the use of the questionnaire, is the problem of gaining the inquiree's confidence. Whereas this is a prerequisite for a sociologist's study, a lawyer who is working on a case for his client will seldom be able to obtain the confidences of the opposing party. This may be one of the reasons why the state FEP Commissions have used the "conference, conciliation, and persuasion" method of enforcing FEP Acts, with primary reliance on voluntary compliance, rather than on court enforcement.

nation against an individual, though perhaps accompanied by a general practice, will in most cases be a single discriminatory act. It is also apparent that discrimination against either a group or an individual may result from state or private actions. State discrimination may result from the use of an outlawed standard as a basis of a constitutional, statutory, or administrative classification,[14] or from its use by state officials or administrative agencies in the conduct of their affairs.[15] The means by which the party alleging discrimination can best meet the burden of proof depends upon whether group or individual discrimination is charged, whether the charge is brought against the state or a private person, and whether damages, an equitable remedy, or the enforcement of a criminal sanction is sought.

II. Means of Proof

Both state and private discrimination may be express,[16] apparent,[17] or admitted. In many cases, however, the state or private person is silent as to the standard used, or if a standard is expressed, though "fair on its face," it may be unlawfully applied. The difficult problems of proof arise in the latter situations when the illegal use of a standard must be proved to a large extent by circumstantial or indirect evidence. It is to these situations primarily that attention will be directed in this note.

The recent Boswell Amendment to the Alabama Constitution offers an excellent illustration of a state directive fair on its face but discriminatory against a group in its application. The Amendment provided that only those persons who could "understand and explain" any article in the federal Constitution could be registered as an elector.[18] Although the words could not be interpreted as being per se discriminatory on the basis of race, the district court labeled this a grant of arbitrary power which denied equal protection because of the ambiguity of the requirements and the absence of any objective or standardized test.[19] Evidence that the advocates of the amendment intended that it should be applied in a discriminatory manner and that in practice such was the case

[14] For example, the "grandfather clauses" controlling election registration. Guinn and Bea v. United States, 238 U.S. 347 (1915).

[15] See cases cited note 22 infra.

[16] For example, a statute providing that Negro teachers should be paid under a different wage scale than white teachers is expressly discriminatory. See Mills v. Lowndes, 26 F. Supp. 792 (Md., 1939).

[17] See Lane v. Wilson, 307 U.S. 268 (1938) (election registration based on prior voting record); Guinn and Beal v. United States, 238 U.S. 347 (1915).

[18] Ala. Const. Art. 8, § 181, as amended and adopted Nov. 7, 1946.

[19] Davis v. Schnell, 81 F. Supp. 872 (Ala., 1949). Although the concepts are not clearly distinguishable, it would seem that an arbitrary power is more a deprival of due process than a denial of equal protection, while the discriminatory application of an arbitrary power would be the latter.

led the court to the conclusion that the amendment was also unconstitutional as a violation of the Fifteenth Amendment of the federal Constitution.[20]

In other cases the constitutional, statutory, or administrative provision is not itself attacked, but an allegedly discriminatory application of a "fair" standard is sought to be enjoined. For example, it has been decided that the fixing of public school teachers' salaries on the basis of race is state action in violation of the Fourteenth Amendment.[21] In many cases the criteria by which the teachers are purportedly evaluated are in themselves nondiscriminatory, and the charge that the criteria have been unlawfully applied will be denied.[22] Proof of discrimination in such a case involves showing that the Negro and white teachers, while possessing equal qualifications and performing comparable duties, nevertheless receive different salaries,[23] the inference being that the Negro teachers are paid lower salaries because of the only common characteristic distinguishing them from the whites, their race. The difficult problem of proof is incurred in attempting to prove that the Negroes are as well-qualified as the whites. This is true because, unlike the election registration cases,[24] the courts have been unwilling to limit the range of a school board's discretion in the employment of teachers to the use of objective or standardized criteria.[25]

[20] Ibid. The evidence included evidence that the "understand and explain" test was given to Negroes and not to whites; that during the incumbency of the defendant County Board of Registrars, whereas 2,800 whites were registered, only 104 Negroes qualified, although Negroes made up 36 per cent of the county's population. The great discrepancy between the Negro-white population ratio and the Negro-white qualification ratio is a result not likely to occur by chance. Because the groups are relatively large it may be tacitly assumed that there are no common characteristics other than race in each group which could account for so large a discrepancy. Thus, here, the court, like the sociologist, can reasonably infer that race is the cause of the results.

[21] Morris v. Williams, 149 F. 2d 703 (C.C.A. 8th, 1945); Alston v. School Board, 112 F. 2d 992 (C.C.A. 4th, 1940), cert. den. 311 U.S. 693 (1940); Mills v. Board of Education, 30 F Supp. 245 (Md., 1939); cf. Kerr v. Enoch Pratt Free Library of Baltimore, 149 F. 2d 212 (C.C.A. 4th, 1945), cert. den. 326 U.S. 721 (1945) (discrimination by a privately endowed library which was for a public purpose and used state funds held to be state action).

[22] Freeman v. County School Board, 82 F. Supp. 167 (Va., 1948); Davis v. Cook, 80 F. Supp. 443 (Ga., 1948). In other cases the school board has attempted to rationalize its actions by such arguments as: Negro teachers were employed only to teach Negro children; therefore, salary was based not on the race of the teachers, but on the "color" of the pupils. See Thomas v. Hibbitts, 46 F. Supp. 368 (Tenn., 1942). White teachers must pay more for economic necessities and in order to maintain a social standing commensurate with their position. See Turner v. Keefe, 50 F. Supp. 647 (Fla., 1943). To recognize such attempts at rationalization would be to destroy in effect the endeavors to outlaw the standard. Another argument has been that Negro teachers are not as well-trained because not admitted to accredited state teachers' colleges. Reynolds v. Board of Public Instruction, 148 F. 2d 754 (C.C.A. 5th, 1945), cert. den. 326 U.S. 746 (1945). A court's recognition of this argument would seem to obliterate the last vestige of the "separate but equal" fiction.

[23] Cases cited notes 21, 22 supra.

[24] Davis v. Schnell, 81 F. Supp. 872 (Ala., 1949).

[25] See Davis v. Cook, 80 F. Supp. 443, 447 (Ga., 1948): "The subjective criteria . . . if applied in a fair and non-discriminatory manner are not only permissible but highly important and commendable."

Thus, not only is it necessary to prove that the Negro teachers hold the same educational degrees as the whites and have equal teaching experience, but also that they are equal, for example, in poise and in the ability to stimulate students.

It would be difficult to show affirmatively that each Negro teacher in a school district has the same objective and subjective qualifications as the white teachers. The probability is slight, however, that *all* the Negro teachers in the district would be deficient in those qualifications, other than race, which are possessed by *all* the white teachers. Therefore, if the Negro teachers employed by a defendant school board satisfy the same objective requirements, yet receive lower salaries than the white teachers performing comparable duties, a reasonable inference would be that the characteristic obviously common to all the Negro teachers is the cause of the wage discrepencies.[26] This is an example of the sociologist's method of inducing from an aggregate of similar effects the use of a racial standard as the more probable cause of those effects.[27]

Two difficulties may arise when attempting this indirect, inductive kind of proof. First, in some cases the group involved may be so small that it could not be reasonably assumed to be a representative sample of the population. For example, in a group of ten teachers, it might be argued that it was not unreasonable that by chance each member of the group lacked a subjective quality in the same way that it is possible that a coin tossed ten times will each time come up heads. However, by taking as the group not only those teachers presently employed, but also those employed in past years, a larger, and therefore more representative and homogeneous group can be considered.[28] A second, and

[26] While a possible inference would be that each of the Negro teachers lacked a different subjective qualification possessed by the white teachers, such an inference would be no more reasonable than the inference that all the Negro teachers lacked the same characteristic.

[27] Note 12 supra.

[28] The question arises whether the evidence of teachers' past wage scales is inadmissible as evidence of past misconduct or of habit. Evidence of past misconduct, while inadmissible to show "bad character," can be introduced for the purpose of showing a design, motive, or intent. Wigmore, Evidence §§ 193, 215 et seq. (3d ed. 1940). Moreover, the teachers' past wage scales are not like evidence of past misconduct introduced for the purpose of showing the likelihood of the present act being performed by the defendant. The issue is not whether the school board paid the Negro teacher lower wages. This is presumably either admitted or proven. The ultimate issue is whether the Negroes were paid lower wages because of their race. The evidence of past wages is evidence of external results identical in appearance with the present results and is introduced for the purpose of presenting the court with the means of determining whether race is the common cause for all the results, both past and present. Because the past and present wages must be considered together in order to determine whether they have any probative value in establishing whether race was a factor in the fixing of wages, the objections raised against evidence of past misconduct seem to have little applicability in the present context. See Wigmore, Evidence § 194 (3d ed. 1940). Nor are the past wage scales introduced as "habit evidence" showing the likelihood of performance of the present act. The probative value of the evidence lies not in the fact that paying Negro teachers lower wages was a habit, but in that the lower wage was accompanied in a multiplicity of instances by the race characteristic.

The past wages are usually introduced by taking a statistical sampling from the master payrolls of the board of education. See, for example, Davis v. Cook, 80 F. Supp. 443 (Ga.,

perhaps more serious, difficulty may arise when the members of the group allegedly discriminated against are not uniformly paid lower salaries than the whites. Thus, evidence that one or more Negroes in the group are paid salaries equal to or greater than those paid the whites performing comparable duties may be introduced by the defendant to show that race is not a characteristic common to all those receiving lower salaries and that therefore no discrimination existed. In some cases the instances of higher salaries to Negroes will be so rare as to clearly reveal that they are merely "token" instances of nondiscrimination. In other cases it may be possible to show that the Negroes receiving the higher salaries are not only equal to but excel the whites, thereby identifying them as special exceptions to a general discriminatory practice. Failing in this, other kinds of evidence might be sought, such as the showing that white teachers started at higher wage rates than Negroes,[29] or that when blanket increases in salary were made, the whites received greater increases than the Negroes.[30]

It is of course true that not all sophisticated methods of discrimination both against the group and the individual can be proved. It is also true that the outlawing of the use of a particular standard may result in the utilization of subtle devices to conceal the continued use of the outlawed standard. It remains to be determined whether the use of such devices will be so great as to defeat the anti-discrimination measures at the evidentiary stage of anti-discrimination enforcement.

In considering proof of discrimination against a group, mention should be

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1948). This undoubtedly is done for the reason that to receive testimony by all the teachers would be highly impracticable. The payrolls themselves would seem to be competent evidence under the well-defined exception to the hearsay rule for the "business entry." Wigmore, Evidence § 1517 et seq. (3d ed. 1940). The sampling technique in obtaining evidence involves the grouping by objective criteria of the wages paid to the teachers. Thus, tables are made according to race, duty performed, years of experience, age, and basic salary. While there might be some objection to the theory underlying the sampling technique as being unscientific, it has been held that ". . . if the method used materially and erroneously affected the conclusions derived from the statistics . . . discrepancies could easliy have been pointed out by tables made [by the defendants]. . . ." Davis v. Cook, 80 F. Supp. 443, 448 (Ga., 1948). While the groups are, in a sense, matters of opinion, nevertheless, since the computations are made by so-called "experts," the evidence would appear to be admissible under the "expert testimony" exception. Since the groupings are made according to objective criteria, the evidence does not raise the objections made against the subjective classifications which may occur in content analysis. See Content Analysis—A New Evidentiary Technique, 15 Univ. Chi. L. Rev. 910 (1948).

In some cases a school board may admit discrimination in the past but allege that the policy has been changed. See Freeman v. County School Board, 82 F. Supp. 167 (Va., 1948). In such a case, of course, if the school board can prove a change of policy, evidence of the past wage rates could not be used in making the desired induction. In the Freeman case, however, the board failed to prove a change of policy and the court held: "The lower salaries consistently paid the colored teachers over a period of years, coupled with the admitted discrimination which existed prior to 1941, lead me to the conclusion that the discrimination existing is due solely to race. . . ." Ibid., at 170.

[29] Thompson v. Gibbes, 60 F. Supp. 872 (S.C., 1945).

[30] Morris v. Williams, 149 F. 2d 703 (C.C.A. 8th, 1945).

made of the relationship between a class action and the means of proof.[31] An important advantage of the class action in this respect is that it makes possible the use of the indirect, inductive method used by the sociologist. When an individual Negro teacher alleges that race has been a consideration in the fixing of his wages, proof that other teachers have been rated on the basis of race is relevant to his case only by means of the inference that since other teachers have been so rated, this teacher has been so rated. But when the issue is whether the group has been discriminated against, the question whether a racial standard has been used in the evaluation of many teachers is directly relevant.[32]

A second advantage of the class action lies in the fact that when the ultimate issue is discrimination against the group, the decisive question often becomes not whether each member of the group is equal in all material respects to members of other groups, but whether there is a group characteristic which makes the members of the group unequal to members of other groups. In the cases of racial, religious, and national groups, the courts must assume that there is nothing in the race, religion, or nationality which would bring about inequality in the group.[33] This assumption, coupled with the showing of a group of sufficient size as to form a representative sample, will lead to the conclusion that the group qua group is equal to other groups. However, such conclusion does not mean that each individual member of the group is equal to members of another group; yet this may be precisely the issue which an individual bringing a charge of discrimination may have to prove in those cases where there is no direct evidence of discrimination.

The selection of jurors on the basis of race is an illustration of state discrimination having features both of discrimination against a group and against an individual. It is well-established that a Negro defendant tried for a crime by a jury which has been selected in a discriminatory manner is deprived of equal

[31] Not only is the financial burden an obstacle to single parties bringing the suit, but when the charge is discrimination against the group and general enjoining is sought, the outcome of the suit may directly affect all the individuals in the group. The federal courts have upheld the class action when brought by qualified Negro school teachers in a school district on the ground that they form a special professional class having rights of common and general interest which can be represented by the plaintiff bringing the suit. McDaniel v. Board of Public Instruction, 39 F. Supp. 638 (Fla., 1941); Rule 23, 28 U.S.C.A. foll. § 723(c) (1948). The courts, in hearing class actions by Negro electors alleging discrimination by county registration officials, have been in conflict. The action was allowed but not considered in Davis v. Schnell, 81 F. Supp. 872 (Ala., 1949), perhaps because the constitutionality of the Boswell Amendment itself was being considered. Contra: Mitchell v. Wright, 62 F. Supp. 580 (Ala., 1945), rev'd on other grounds, 154 F. 2d 294 (C.C.A. 5th, 1946), cert. den. 329 U.S. 733 (1946), denying class action on the ground that the Negro electors did not comprise a specific class like the professional teacher group. In a rehearing of the substantive issues no class action was brought. 69 F. Supp. 698 (Ala., 1947).

[32] Note 28 supra.

[33] Such an assumption in many cases ignores the long-run social effects of group discrimination. For example, while there may be nothing inherent in the group which would bring about inequality in the group, discrimination against the group may deprive the members thereof of equal training and educational opportunities. See Myrdal, An American Dilemma c. 17, § 5 (1944).

protection of the law and is therefore entitled to a retrial.[34] The basis of this right to a retrial is, in the absence of a special statute, the notion of a right to a trial by an unbiased jury, the presumption being that a jury deliberately made up of white persons will be prejudiced against a Negro.[35] The ultimate issue is whether the particular jury trying the defendant has been selected on a racial basis. The discrimination is against a group in the sense that the selection of jurors on a racial basis discriminates against all Negroes who might otherwise have been selected but for their race.[36] But the courts have considered the injury caused by such discrimination only as it affects the party being tried by the particular jury in question.[37] The charge of discrimination in this type of case, then, is a charge against the state for group discrimination which has caused injury to a particular individual. But whereas the previously discussed cases of group discrimination involved general discriminatory practices, this situation theoretically involves a single instance of discrimination, the selection of the particular jury trying the complainant.

In the absence of direct evidence or an admission, proof that the jury in question has been unlawfully selected is particularly difficult, if not impossible, because the absence of discrimination in no way guarantees that every jury panel will have either a proportionate representation of Negro and white members, or in fact, that any Negroes will appear on a particular jury.[38] The Supreme Court has, however, made it possible to avoid this difficulty. It has held that proof of systematic discrimination in the past, coupled with the presence of Negroes in the district qualified to serve, is sufficient to justify the granting of a retrial in the absence of proof by the state that no discrimination in fact existed.[39] This is clearly use of habit evidence to prove present conduct.

[34] Patton v. Mississippi, 332 U.S. 463 (1947); Hill v. Texas, 316 U.S. 400 (1942); see 1 A.L.R. 2d 1291 (1948) for a collection of cases.

[35] Fay v. New York, 332 U.S. 261 (1947), rehearing den. 332 U.S. 784 (1947).

[36] See Strauder v. West Virginia, 100 U.S. 303, 308 (1879). "The fact that colored people are singled out . . . is practically a brand upon them . . . an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."

[37] Cases cited note 34 supra. A white man, although tried by an intentionally all white jury, is not, in most cases, injured by racial prejudice and cannot invoke the Fourteenth Amendment without showing special injury. Griffin v. State, 183 Ga. 775, 190 S.E. 2 (1937); cf. State v. James, 96 N.J.L. 132, 114 Atl. 553 (1921) (defendant, a male, could not claim unequal protection when tried by an all-male jury).

Again the inter-relationship between "due process" and "equal protection" becomes evident. A biased jury, it may be said, results in the deprival of due process. Discrimination in the selection of jurors is an unconstitutional deprivation of equal protection only when the discrimination may result in a biased jury. Perhaps an explanation for the presence of this limitation lies in the fact that the courts have considered the discrimination primarily as it affects the party on trial and not as against the members of the class excluded.

[38] Fay v. New York, 332 U.S. 261 (1947), rehearing den. 332 U.S. 784 (1947); Akins v. Texas, 325 U.S. 398 (1945); Thomas v. Texas, 212 U.S. 278 (1909).

[39] Patton v. Mississippi, 332 U.S 463 (1947); Hill v. Texas, 316 U.S. 400 (1942); Norris v. Alabama, 294 U.S. 587 (1935).

It appears, however, to be justifiable both on theoretical and practical grounds. There is a strong probability that jury commissioners who have systematically discriminated in the past are not likely to change their course of conduct without such change having visible manifestations. If a change has taken place the state can prove it. Moreover, in a practical sense, the use of habit evidence in this context might be justified on the ground that little or no other evidence will be available to the defendant allegedly deprived of equal protection.

The Supreme Court has said that if it can be shown that no Negroes have served as jurors for a period of years and that there were Negroes in the district qualified to serve, this is sufficient to create a "prima facie" case of discrimination.[40] The implicit reasoning underlying the recognition of the "prima facie" case seems to rest on common-sense notions of probability. It is assumed that, by the laws of chance, in an area where both Negroes and whites are qualified to serve, a nondiscriminatory selection will result, over a period of time, in both Negroes and whites actually serving. Thus, if in fact no Negroes have served, it is reasonable to infer that race rather than chance is the probable cause of the result.[41] The length of time in which no Negroes have served which would lead to such an inference will vary inversely with the proportion of Negroes in the area who are qualified to serve.[42]

A more difficult problem of proof may arise when members of a particular race or class are not totally excluded from jury service, but where a disproportionate representation is shown to have been present over a period of years. The question arises whether either common sense notions or a statistical analysis can account for a consistent disproportion as being brought about because of racial discrimination. The problem involves the prediction of an expected representation in the absence of discrimination and the determination of whether the deviation between the actual representation and the expected one is "significant." The important figure in making the prediction is the number of Negroes in the area qualified to serve. However, in many states the qualification requirements may be such that the number of qualified Negro voters in a

[40] Ibid. It has also been said that if it can be shown that there were literate Negroes in the area, the presumption would be that at least some were qualified to serve. Hill v. Texas, 316 U.S. 400 (1942).

[41] Smith v. Texas, 300 U.S. 128 (1940). While this is not a necessary inference, it is no doubt felt that the greater probability justifies the shifting of the burden to the state to demonstrate that another explanation can reasonably account for the exclusion.

[42] For example, in a district comprised of 75 per cent Negroes, half of whom are qualified to serve on juries, the probability that no Negro would appear on a single twelve-man jury in the absence of discrimination is approximately $.4^{12}$. Nevertheless, no court has said that the absence of Negroes from a particular jury would alone justify the granting of a new trial, nor is a defendant in any case entitled to a proportionate representation or any representation of his group on a jury or jury panel, if they have been selected in a nondiscriminatory manner. Cases cited note 38 supra. Where it was shown that Negroes constituted one-half of the population of 12,000–15,000 from which the general jury venire was drawn, and that no Negro for a period of ten years had served on a grand or petit jury, this, in view of the fact that the state failed to call the jury commissioners as witnesses, justified a finding of discrimination. Pierre v. Louisiana, 306 U.S. 354 (1939).

given district may be so few as to make valid prediction impossible.[43] Another difficulty in making a prediction as to an expected representation may arise when the proportion of Negroes in the area either increases or decreases materially during the period which the prediction covers.[44] Thus it can be said that while the extended absence of Negroes from jury service tends to establish discrimination, the disproportionate representation of Negroes on juries without other evidence has little probative value.

Proof of discrimination against an individual gives rise to the greatest difficulties, because in many cases the only method of proving the use of an outlawed standard is the inference which may be drawn from showing that an individual allegedly discriminated against is equal to other persons in respect to those standards on which the treatment was based.[45] For example, if it can be shown that a rejected Jewish job applicant is as equally qualified for the job as gentile applicants who have been accepted, or as the present employees, a reasonable inference would appear to be that the Jewish applicant was rejected because of his religion. The difficulty arises because an employer may use whatever objective or subjective standards he chooses other than those outlawed by the state. An employer may refuse to hire men with red hair, or he may fire an employee because he has a "displeasing manner" without violating a Fair Employment Practices Act which outlaws employment only on the basis of race, creed, color, or national origin.[46] It can be seen that proof of discrimination then will often involve distinguishing the actual cause of the employer's actions from his alleged reasons or pretext.

Proof of discrimination in employment will be taken as the illustrative case of individual discrimination not only because it offers excellent illustrations of the general problems involved, but also because economic discrimination is of primary concern to the minority groups,[47] and finally because the problem of proof is of immediate and widespread importance to lawyers with the passage of FEPC Acts in an increasing number of states.[48] The New York Anti-Discrimination Law,[49] since it was both the forerunner of and the model for subsequent acts, will be used as the basis for discussion.[50]

[43] Qualification requirements may include literacy, lack of a criminal record, "intelligence," "good moral character," election registration. Exclusion of Negroes from Jury—Sufficiency of Evidence to Establish Discrimination, 30 J. Crim. L. 264 (1939). Thus, as an example, in a southern state where the election registration has been conducted in a discriminatory manner, very few Negroes may be available for jury service.

[44] Moore v. New York, 333 U.S. 565 (1948).

[45] In cases where an affirmative remedy is sought, rather than a cease and desist order or an enjoining of discriminatory practices, proof of the individual complainant's equality may be a necessary element in order to show that but for the use of the outlawed standard the complainant would have been treated differently.

[46] Statutes cited note 1 supra.

[47] See Myrdal, An American Dilemma c.3, § 4 (1944).

[48] Note 1 supra.

[49] N.Y. Executive Law (McKinney, Supp. 1948) c. 23, §§ 125–36.

[50] See Graves, Anti-Discrimination Legislation in the American States (1948).

At the outset it should be noted that the problem of proof in question is not identical with proof in the law courts, for the findings of discrimination are made by an administrative commission not bound by the strict legal rules of evidence.[51] However, the commission's findings are subject to judicial review and must be supported by "sufficient evidence on the record considered as a whole."[52] Thus, while questions of competency need not be considered, the fundamental problems of relevancy and of probative value are the same. It should also be pointed out that both in New York and other states in which anti-discrimination statutes have been passed, primary reliance is placed upon the "conference, conciliation, and persuasion" method of enforcement rather than upon court actions.[53]

But while voluntary compliance appears to be the primary means of enforcing the statute, the ultimate test of the statute's efficacy will depend upon the courts' willingness to enforce the commission's orders. This in turn will presumably depend upon the evidence of discrimination offered in the formal hearing.

[51] N.Y. Executive Law (McKinney, Supp. 1948) c. 23, § 132.

[52] Ibid., at § 133. While neither the Commission nor the courts have yet had occasion to interpret this phrase the view has been expressed by the General Counsel of the New York Commission that it is believed that it will be given effect similar to that given the "substantial evidence" rule. Correspondence from the General Counsel of the New York Commission, dated May 4, 1949. Under the Wagner Act the courts have said that substantial evidence is that "relevant evidence acceptable to a reasonable mind as adequate to support the conclusion, and it must be enough to justify, if the trial were to a jury, refusal to direct a verdict." Montgomery Ward & Co. v. NLRB, 107 F. 2d 555 (C.C.A. 7th, 1939), citing Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938); NLRB v. Columbian Enamel & Stamping Co., 306 U.S. 292 (1938). Fair Employment Practices Acts in the other states vary to some extent both as to the applicability of the legal rules of evidence and the scope of judicial review. Statutes cited note 1 supra.

[53] SCAD Annual Report (1946); Correspondence from the Chairman of the Massachusetts FEP Commission, dated April 29, 1949. As a sanction for the Commission's recommendations made at these informal meetings the proceedings are kept secret with the warning that in the absence of compliance public hearings will be held. See the New State Commission Against Discrimination: A New Technique for an Old Problem, 56 Yale L.J. 837 (1947). Upon receiving a complaint of discrimination, an investigation is made by the Commission of the employer's employment processes, his sources of recruitment, job specifications, wages, hiring, and promotion and dismissal procedures. At the same time the individual qualifications of the particular complainant are determined. If "probable cause" is found either to credit the complainant's allegations or to indicate a general discriminatory employment pattern an informal conference with the respondent is held. It is at this stage that voluntary compliance with the Commission's recommendations are sought. Through 1948, resort to proceedings beyond this stage have been unnecessary. SCAD Annual Report 3, 5, 37 (1948). As to what constitutes "probable cause" the General Counsel has indicated that the finding of "probable cause" by the Commission's investigator is not the same thing as a finding of fact that respondent was discriminatory. Correspondence from the General Counsel of the New York Commission, dated May 4, 1949. If voluntary compliance is not obtained, a formal hearing may be held. N.Y. Executive Law (McKinney, Supp. 1948) c. 23 § 132. It is upon the Commission's findings and orders made at the formal hearing that an appeal to the courts may be taken either by the complainant, employer, or other person aggrieved by such order, or by the Commission itself. Ibid., § 133. It should be emphasized that since no formal hearings or court actions have been held, either in New York or the other states, the meanings of "probable cause" and "sufficient evidence" are speculative questions whose ultimate interpretation must rest with the courts.

While there can be no doubt that some flagrant cases of discrimination can be easily proved, the question arises whether some of the more subtle instances of discrimination can be controlled by legal sanctions.

Generally the evidence tending to establish that an employer has discriminated against an individual can be divided into three categories (1) evidence of general discriminatory employment patterns and practices in the plant; (2) evidence that the complainant is qualified for the job in question; (3) evidence showing that the reasons given by the employer for his actions are unsubstantiated or are mere pretext.

The evidence described in the first category is again evidence of discrimination against a group used to establish the probability of discrimination against the individual complainant. It is clear that this evidence alone without further evidence of the kind described in the second category would not be enough to justify an order requiring the employer to take affirmative action toward the complainant. The Commission has said, however, that "[d]iscrimination in employment should not be treated as an isolated act. As a rule it is a continuing action crystallized into a policy accepted and approved by management and labor and the community."[54]

The evidence of discrimination against the group is similar to the types of evidence already discussed. But the complexities involved in the employment situation are sufficiently different to merit special discussion. A hypothetical case will serve as a basis from which several of the complexities may be illustrated.

X, a Negro, in answer to an advertisement for a machinist, applies for a job at a plant engaged in manufacturing safety-pins. The plant has 300 employees, none of whom are Negroes, and is situated in a community whose population is 10 per cent Negro. Negroes have never been employed at the plant. X is refused the job without reason, but the Commission's investigator is told that the reason for refusal was that X "looked dishonest."

The first question is whether the fact that no Negroes have been employed is evidence of discrimination; that is, whether the probability that no Negroes would be employed in the absence of discrimination is sufficiently small as to lead to the inference that racial discrimination caused the absence of Negro employees. The problem here, as in the jury-selection cases,[55] is to make a pre-

[54] SCAD Annual Report 2 (1948). "The terms of conciliation in complaints where probable cause has been found have been directed not only to secure adjustment of the individual complaint but to change the hiring policy on every occupational level. Even where probable cause was not found for crediting the allegations of the complaint as to the individual complainant, the Commission, where appropriate, has outlined a course of action for the respondent to follow to assure compliance with the provisions of the Law." Ibid., at 5. In Connecticut, on the other hand, it appears that primary attention has been directed toward the adjustment of specific charges rather than "blanket charges" except where there is a written regulation or policy which is in itself a violation of the FEPA. Correspondence from the Connecticut Supervisor, Fair Employment Practices Division, dated May 2, 1949.

[55] Cases cited note 39 supra.

diction as to the number of Negroes expected to be employed in the absence of discrimination and to determine the deviation of the actual number of Negroes employed (in this case, zero) from the expected number. In most cases, however, the prediction of an expected number rests on so many factors other than the proportion of Negroes in the community that its validity would be extremely doubtful. First, the number of Negroes in the community qualified for the work must be determined.[56] Second, it is necessary to determine the number of Negroes who have applied for jobs at the plant.[57] It is also necessary to determine not only how many workers are presently employed, but also the personnel turn-over in the plant and the number of hirings in the period in question. An even more difficult problem arises when the plant in question has employed some Negroes in the past but it is suspected that the plant operates on an undisclosed "quota system." In such a case not only would the general qualifications of the Negroes have to be considered, but also job differentiations would have to be made. Moreover, assuming that a valid prediction could be made, in the case of a small plant with little turn-over in personnel, the deviation of the actual number from an expected number of Negroes employed may not be "significant."[58] This is not to say, however, that the fact that no Negroes had been employed in a plant over an extended period, or that the number of Negroes employed was relatively small, has no probative value when shown with other evidence. In the hypothetical case, if it could be shown that X and other *qualified* Negroes had applied for jobs and had been refused although the plant had been hiring, a finding of discrimination might be substantiated by the fact that no Negroes or few Negroes had been employed. Similarly, in the case of discharges alleged to be discriminatory, if the proportion of Negroes laid off greatly exceeded the proportion of whites, this might lead to the inference that the discharges were made on the basis of race if it could be shown that the Negroes discharged were as qualified as the whites who were retained.[59] Again,

[56] Consider, for example, if the complainant were a chemist seeking a job at a chemical laboratory.

[57] Consider, for example, the so-called "white-men jobs," those for which, as a result of custom, Negroes seldom applied. In such a case the fact that no Negroes were employed would have little significance in establishing that an employer had discriminated. For example, prior to World War II, these jobs included electrical workers, machinists, and sheet metal workers. See Weaver, Negro Labor—A National Problem 18 et seq. (1946).

[58] See Fisher, Statistical Methods for Research Workers c. 3 (1938).

[59] Compare Matter of F. W. Woolworth Co., 25 N.L.R.B. 1362, 1373 (1940) (discharge of union employees): "It would be expected that in a selection of employees to be laid off without regard to union affiliation the proportion of union members among those laid off would approximate the proportion existing in the group from which the selection was made. . . . Of course any combination is a possible result on the basis of pure chance. Variation from the expected does not necessarily establish that the operation of chance has been frustrated by intelligent selection. When, however, the variation is marked or is manifested consistently in repeated samplings, the hypothesis that union membership was irrelevant to the selection gives way to the inference that the selection was made upon a discriminatory basis."

An essential distinction between union, on the one hand, and racial, religious, and national-origin discrimination, on the other, is that whereas the former is confined generally to the

in a plant where Negroes are hired to fill only certain jobs, while such a showing in itself might not be significant, this coupled with the showing that qualified Negroes had been refused jobs in other capacities while whites had been hired might reasonably lead to the inference that there had been discrimination.

The second question is, how can "equal qualification" be shown? In the cases where a plant gives examinations as a prerequisite to employment, the results of these examinations would seem to offer an accurate guide.[60] The training and experience of the complainants and other applicants are also helpful indications. A second step would be to compare the objective qualifications of the individual complainant with the job specifications of the employer and with the qualifications of other applicants and employees.[61]

The question of subjective qualifications is closely related to the evidence described in the third category, the reasons given by the employer for his actions. As the term implies, subjective qualifications are primarily matters of individual opinion. But assume that an employer alleges that the complainant lacked a subjective qualification. If it can be shown either that the complainant could not reasonably be thought of as lacking in such qualification, or that the qualification was not reasonably related to the employment in question, then it would seem reasonable to use this showing as evidence that the employer had in fact discriminated. The NLRB, in hearing cases of alleged discriminatory discharges on the basis of union activity, has used as evidence of discrimination the fact that the employer gave a reason for discharge to the employee different from that presented to the Board, or the fact that the employer failed to assign a reason.[62] Thus, in the hypothetical case, while if X were in fact dishonest this could be understood as valid grounds for refusal, the burden should be placed on the respondent of showing the reasonable basis for his belief of X's dishonesty. His failure to do so could be taken as evidence

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employment relationship, the latter pervades the entire culture so that as a result of discrimination, the Negro, for example, may not only be refused a job on the basis of race, but also may be deprived of equal opportunities for training. Thus the assumption of equal qualification of Negro workers and white workers cannot as readily be made as in the case of union workers and nonunion workers. See Myrdal, An American Dilemma c. 3, § 7, and App. 3 (1944). In the case of discharges there is also the question of seniority, particularly in plants in which Negroes have only recently been hired.

[60] In some cases employers may destroy the examinations of rejected applicants, or of all applicants, in order to avoid their being used as evidence. The SCAD, having found "probable cause," may insist that an employer keep a record of all applications for employment during the following six-months' period, identifying the white and Negro applicants, the race of the applicants hired, and the reasons for the rejections. SCAD Annual Report 29 (1948).

[61] Such a procedure is practiced in New Jersey and Connecticut. Correspondence from Chief Assistant, New Jersey Division Against Discrimination, dated April 28, 1949; Supervisor, Conn. FEP Division, dated May 2, 1949.

[62] Matter of National Casket Co., 12 N.L.R.B. 165 (1939), aff'd NLRB v. National Casket Co., 107 F. 2d 992 (C.C.A. 2d, 1939) (alleged reason for discharge given at hearing was the tardiness of the employee, but this excuse not given to employee upon discharge); Matter of Caroline Mills, Inc., 71 N.L.R.B. No. 54 (1946).

that he had in fact discriminated.[63] While it may be said that the use of this kind of evidence in effect shifts the burden to the employer to justify his actions, it would seem that if it could be shown that the complainant had satisfied the employer's objective requirements, it would be reasonable to require the employer to show that his actions were not in fact based on an outlawed standard.[64]

In the employment field, as in the previously discussed forms of discrimination, the use of the "quota system" has appeared. While there can be no doubt that a quota system, based on an outlawed standard, is equally as discriminatory as complete exclusion, it is often impossible, in the absence of direct evidence, to distinguish a shrewdly operated quota system from the results of a chance distribution. Thus the passage of anti-discrimination laws may result in the more widespread use of quota systems as a device for concealing the use of an outlawed standard. But while it may be impossible to demonstrate that an employer is operating under a quota system, the evil effects of such a system can be partially alleviated if the fact that Negroes, Jews, or any minority group have been or are being employed is not considered in itself conclusive evidence that a particular complainant, whose qualifications have been demonstrated, has not been discriminated against.

III. Burden and Precision of Proof

The paradox of the enactment of anti-discrimination statutes leading to the use of discriminatory quota systems is an illustration of the very real danger that effective enforcement of anti-discrimination measures may be defeated at the evidentiary stage. It is because of this danger that in enforcing such measures primary reliance must be placed on voluntary compliance. However, the dangers also may to some extent be alleviated by the requirements set up for the burden and precision of proof of discrimination. For while precision and certainty in proof of discrimination may be impossible for the complainant, proof that an action was in fact not based on an outlawed standard does not in many cases present such difficulty to the accused. This is true because the reasons for a person's actions lie primarily within his own knowledge. If there has been no discrimination, the defendant can show that there were good reasons for his actions.[65] On the other hand, the dangers of unjustifiably limiting free choice

[63] In addition, there is the fact that no reason was given to the applicant for refusal to hire him.

[64] See Bailey v. Washington Theatre Co., 112 Ind. App. 336, 41 N.E. 2d 819, 821 (1942). In considering whether refusal to admit a Negro into a theater was in violation of the state civil rights statute, the theater owner gave as his reason for refusal, "I just don't like you, and just don't want you in my theater." Although dictum, because the owner in court admitted that he refused admission because of race, the court's comment on his alleged reason is pertinent: "It is apparent that in all cases where a colored person is denied the right and privileges guaranteed him . . . a defendant could deny that exclusion was because of race or color, and could place the reason therefor as dislike. When such a defense is asserted, and no basis for dislike is shown, this court, upon appeal, is not bound by the seeming conflict."

[65] See NLRB v. Remington Rand, Inc., 94 F. 2d 862 (C.C.A. 2d, 1938).

must also be kept in mind. The doctrine of the prima facie case affords an effective compromise between the difficulties of precise proof of discrimination and the unjustified limitations on free choice which too lax requirements of proof would create. While the burden of introducing evidence and of persuasion would originally rest with the party bringing the charge, if the complainant could show that the use of an outlawed standard provided a reasonable explanation for the defendant's present and past actions, then it could be said that the complainant had met the burden unless the defendant could show that his actions and the results complained of were brought about for reasons other than the use of the outlawed standard.

It is a different question, however, to determine what elements should be present before a prima facie case is recognized. Several factors must be considered: the nature of the charge, the type of action brought, and the remedy sought. For example, the Supreme Court's willingness to recognize a prima facie case in the discriminatory jury-selection cases[66] can be explained in part, at least, by the fact that the remedy sought is an impeachment of a verdict and not a criminal punishment or direct or indirect financial recovery. Thus, an erroneous finding of discrimination, which in fact did not exist, would result merely in placing an extra burden on the state judicial machinery.[67] Likewise, in the case where a general injunction is sought, less certainty in the proof would be necessary than where affirmative action is the remedy desired. In the case of discrimination against a group, the showing of the general equality of the group to other groups plus the showing of unequal treatment accorded to the group should be sufficient to raise a prima facie case,[68] while in the case of discrimination against an individual, the equality of the particular individual in question to other individuals differently treated should be demonstrated. Nevertheless, in the latter situation as well, it would seem that if a job applicant could show, for example, that he possessed the objective qualifications for the job in question, the burden could reasonably be placed on the employer to

[66] Cases cited note 39 supra.

[67] Moreover, since the question of discrimination in jury selection has most often arisen in criminal cases, the policy of assuring the accused a fair hearing would seem to outweigh any considerations of efficient jural mechanics. See Pierre v. Louisiana, 306 U.S. 354, 358 (1939): "Yet when a claim is properly asserted . . . that a citizen whose life is at stake has been denied the equal protection of his country's laws on account of his race, it becomes our solemn duty to make independent inquiry and determination of the disputed facts—for equal protection to all is the basic principle upon which justice under law rests." See Berger, The Supreme Court and Group Discrimination since 1937, 49 Col. L. Rev. 201 (1949).

[68] In the cases of group discrimination against Negro teachers some courts have indicated a tendency to recognize a prima facie case when the unequal payment of Negro teachers is shown. See Davis v. Cook, 80 F. Supp. 443, 451 (Ga., 1948). Accounting for statistical errors, ". . . there is still left so wide a gap between comparative salaries of white and Negro teachers that it cannot be attributed to other causes than discrimination because of color or race." But other courts have required more than the showing of a statistical discrepancy between wages received by white and Negroes. Reynolds v. Board of Public Instruction, 148 F. 2d 754 (C.C.A. 5th, 1945), cert. den. 326 U.S. 746 (1945); Turner v. Keefe, 50 F. Supp. 647 (Fla., 1943).

justify his actions as not being discriminatory. Finally, it would seem reasonable to require a greater precision and certainty of proof when an action is brought against a private person than when brought against the state.

The conflict between free choice and equality which is created by the enactment and the enforcement of anti-discrimination measures will exist as long as racial, religious, and other forms of group prejudices endure in our society. While the fact that discrimination is not susceptible of certain proof may heighten this conflict, a judicious establishment of the requirements of proof and a skillful manipulation of the burdens created by these requirements may serve to prevent the engulfing of either ideal by the other.

DETERMINATION OF JUST COMPENSATION IN A CONTROLLED MARKET

When private property is taken for public use, the usual measure of "just compensation"[1] is "market value."[2] The justice of this measure in a free market appears manifest: "These market values, being the result of competitive purchase by persons free to utilize purchasing power as they please, may be accepted as measuring roughly the relative importance (for the community) of physical units of different things."[3]

However, when the government requisitions commodities in wartime, the adequacy of the normal rule is challenged by three different market situations.

First, the wartime market reflects "unusual" economic circumstances involving "abnormal" conditions of supply and demand, and it may be argued that these abnormalities should be recognized in a court's finding of just compensation. In *C. G. Blake Co. v. United States*,[4] a case arising out of World War I, the government maintained that "on account of abnormal conditions, resulting from the war . . . there was no true or fair market, and no such thing as fair market value. . . ."[5] The court held, however, that "fair market value" does not necessarily mean value in "a market in which the supply about equals the demand, and in which conditions might be termed fairly normal. . . ."[6] Such wartime economic abnormalities provide no greater reason to suspend the market value rule than comparable abnormalities in peacetime:

[1] ". . . nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. 5.

[2] The phrases "market value" and "just compensation" have been used interchangeably to such a degree that Nichols declares, "Market value, and market value alone, is the universal test." 1 Nichols, Eminent Domain 663 (2d ed. 1917); see 2 Lewis, Eminent Domain § 706 (3d ed. 1909). The current view is that "market value is simple the ordinary test, to be rejected in those exceptional cases where it would not constitute 'just compensation.'" Orgel, Valuation Under Eminent Domain 60 (1936).

[3] Simons, Economic Policy for a Free Society 46 (1948).

[4] 275 Fed. 861 (D. C. Ohio, 1921).

[5] Ibid., at 862.

[6] Ibid., at 866.

Drouths, floods, commercial panics, crop failures, labor difficulties, and other causes frequently affect markets seriously, but not so as to warrant a court, when assessing compensation consequent upon the exercise of the right of eminent domain, in saying that there is no market. The effects of war may differ in degree, but, so long as a market—that is, a general buying and selling of the commodity—exists, the rule persists.[7]

If market value is just compensation because it is the measure of value freely arrived at by the community in the course of competitive buying and selling, the result of the *Blake* case surely follows.[8]

The second and third wartime challenges to the market value rule arose in the recent war because the characteristic market situation was not one in which price was competitively determined. Either the commodities taken were subject to government price control under OPA regulations; or, because of their peculiar importance to war production, the commodities taken were subject to stringent government market controls which effected virtual suspension of trade in normal volume. In the former case, it was urged that the rationale of the market value rule, based on the assumption of a free market, could not be applied to the OPA ceiling price; in the latter situation, it was argued that there was simply no market price to turn to.

The Supreme Court has never ruled squarely on the question whether a ceiling price constitutes just compensation. In *United States v. Felin & Co., Inc.*,[9] Justice Reed, in a concurring opinion, characterized the constitutionally established ceiling price as "the only relevant measure of just compensation."[10] Joined by Justices Black and Murphy, he argued that the government could constitutionally require owners of this perishable property either to sell at the fixed price or not to sell at all. "If the Government fixed prices with the predominant purpose of acquiring property affected by its order, a different situation would be presented."[11] But here was price regulation affecting buying

[7] Ibid., at 864. Insofar as the Blake case indicated that the courts should disregard government regulations and priorities in fixing just compensation in wartime, the Circuit Court of Appeals for the Second Circuit expressly refused to follow it in a case involving the valuation of land. United States v. Delano Park Homes, Inc., 146 F. 2d 473, 474 (C.C.A. 2d, 1944).

[8] The Supreme Court approved this line of reasoning in United States v. New River Collieries Co., 262 U.S. 341 (1923). No case in the recent war appears to have challenged the market value rule solely on the basis of alleged economic abnormalities. Having imposed direct economic controls earlier and on a broader scale than in World War I, the government has argued that the various prices prevailing under such controls were the measures of just compensation for commodities taken.

[9] 334 U.S. 624 (1948). In World War I, the prevailing price for copper fixed and enforced by the government in cooperation with copper processors was held by the Supreme Court to be just compensation for copper requisitioned by the government, when the owner had actively assisted in setting the price and enforcing compliance. Vogelstein & Co., Inc. v. United States, 262 U.S. 337 (1923).

[10] 334 U.S. 624, 646 (1948). Justice Reed cites Vogelstein & Co., Inc. v. United States, 262 U.S. 337 (1923), as authority for the statement that the "prevailing price in a controlled market was 'just compensation.'" 334 U.S. 624, 645 (1948).

[11] United States v. Felin & Co., Inc., 334 U.S. 624, 646 (1948).

and selling on a national scale. To require the government in this situation to pay a higher price for requisitioned property than that legally obtainable from the general public would be "anomalous,"[12] especially when the regulations were themselves subject to judicial review.[13]

Justice Frankfurter, joined by the Chief Justice and Justice Burton in the majority opinion, upheld the government's award of ceiling price as just compensation on other grounds. The majority declared that the burden was upon the complainant to prove that the original government award was less than just compensation, and that, since it had not done so, the Court need not consider the controversial question as to whether a fixed market price was of itself just compensation.[14] As to that question, however, Justice Frankfurter indicated disagreement with the Reed view that controlled selling price was just compensation because it was the maximum price legally obtainable in the prevailing market.[15] While market price is the conventional criterion, ". . . there must be a market to make the criterion available. Here there was a market . . . but it was not a free and open market; it was controlled in its vital feature, selling price, by the OPA."[16]

In a second concurring opinion, Justice Rutledge, remarking that the Reed view "may be" correct in the case of highly perishable property, held that the ceiling price itself furnished at least a presumptive measure of just compensation which must be allowed to stand in the present case, the complainant not having overcome the presumption with a showing of compensable loss.[17] Justices Jackson and Douglas dissented:

> [M]arket price, as such, is not controlling. The Fifth Amendment's "exact limitation on the power of the Government" is not market price—it is just compensation. The former is relevant, and this Court has so considered it, only because, in a free market, it is perhaps the best key to value at the time of taking.[18]

The dissent believed that if the ceiling price were found to be just compensation in this case, it would thereafter be necessary for all ceiling prices to meet the constitutional requirement of just compensation to be valid.[19] This would of course be an intolerable burden upon the administration of price controls. The purpose of the price control act was "to prevent speculative,

[12] Ibid., at 645.

[13] Justice Reed places some emphasis upon the fact that perishable goods were involved in the Felin case. This leaves open the question whether ceiling price should be the measure of just compensation for goods the owner might retain without risking spoilage. If an owner of such goods were to decide to retain his goods until the lifting of ceilings, the ceiling price would not necessarily be the maximum price legally obtainable. Compare Pantex Pressing Machine, Inc. v. United States, 71 F. Supp. 859, 862 (Ct. Cl., 1947).

[14] United States v. Felin & Co., Inc., 334 U.S. 624, 641 (1948).

[15] Ibid., at 630.

[16] Ibid.

[17] Ibid., at 647, 648.

[18] Ibid., at 652.

[19] Ibid., at 651.

unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practises resulting from abnormal market conditions"[20] of wartime; just compensation, on the other hand, has sometimes required an award of "unwarranted" prices in "abnormal" markets.[21]

The *Felin* case poses the problem. If market price is just compensation because it is the best measure of value in a free market, some other measure of value is required when the government enforces a fixed ceiling price. If market price is just because it is the highest price legally obtainable in the prevailing market, a government ceiling price qualifies as just compensation, provided the price has not been fixed with the predominant purpose of acquiring for public use the property affected. In no case can the ceiling price be defended as just compensation merely because anything higher would be "abnormal" according to the standards of a congressional price control act.

If the courts adopt the view which justifies market prices only if there is a free market, the problem of finding substitute measures of value arises in any situation in which the market is regulated. The difficulties barring a solution of this problem appear in a third type of case, where the government requisitions commodities which, because of their importance to the war, have been placed under close government trading controls. These controls not only restrict the free determination of price as do simple price controls, but, in addition, severely limit the amount of trading in the controlled market. For example, during the recent war the use or sale of aluminum for any but authorized purposes was forbidden by government order. To channel into essential war production the goods made idle by this order, the government offered to purchase aluminum inventories at a price that was 75 per cent of the market listings, feeling that in the light of the regulations and uncertainties of wartime, such a price was sufficient to induce voluntary sales by the holders of aluminum.[22]

[20] Emergency Price Control Act, 56 Stat. 23, 24 (1942). The price control act also sought to "assure that defense appropriations are not dissipated by excessive prices." Ibid.

[21] United States v. New River Collieries Co., 262 U.S. 341 (1923); C. G. Blake Co. v. United States, 275 Fed. 861 (D.C. Ohio, 1921); National City Bank of New York v. United States, 275 Fed. 855 (D.C. N.Y., 1921). However, the owner cannot trade on the necessities of the government by demanding "strategic value" for his property. United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913); cf. Lawrence v. Boston, 119 Mass. 126 (1875). Nor will the courts recognize a price manipulated by the owner of the property. Lovejoy v. Michels, 88 Mich. 15, 27, 49 N.W. 901, 903, 904 (1891); cf. Muser v. Magone, 155 U.S. 240 (1894).

In Walker v. United States, 64 F. Supp. 135, 140 (Ct. Cl., 1946), the Court of Claims disregarded the fundamental distinction in objectives between congressional enactments to control inflation through price ceilings and judicial determinations of value for just compensation purposes. Without exploring the question as to whether the ceiling price was of itself just compensation, the court said that it was not surprising that just compensation, judicially determined, and ceiling price, administratively fixed, should turn out to be equivalent, "in view of the statutory basis by which the Administrator was bound."

[22] Illinois Pure Aluminum Co. v. United States, 67 F. Supp. 955, 957 (Ct. Cl., 1946).

In *Pantex Pressing Machine, Inc. v. United States*,[23] the government argued that the purchase program price was the measure of just compensation for requisitioned aluminum. But the Court of Claims held that "the fact that 98 per cent of the holders of aluminum in this country turned over to the Government 96 per cent of their holdings at this price . . . did not establish a market"[24] such as would qualify the price as just compensation. In the absence of a determinable market value, the court adopted, as the nominal measure of just compensation, "retention value," which is described as follows:

> While the Government . . . has the unquestioned right to impose restrictions . . . nevertheless when it takes a person's property it must compensate him in the light of his right to retain his property, unless requisitioned until the restrictions on its use and disposition should be removed. If it is possible to ascertain the market value of the property at the time of the taking, a plaintiff is entitled to recover this value, less these carrying charges. This is what the defendant aptly calls "retention value."[25]

Of course, the inability of the courts to determine "market value of the property at the time of the taking" is responsible for the confusion in these cases. After rejecting the various figures suggested by the parties as the proper "market value" in this case, the court held that the plaintiff was entitled to an award of cost plus a "fair mark-up for profit." The court concluded, saying, "There is no testimony covering profit and other expenses and carrying charges, but we think it fair and equitable to conclude that one would about offset the other."[26] In effect, then, original cost provided the measure of value in this case.[27]

Once market price is abandoned as the measure of value, it seems clear that

[23] 71 F. Supp. 859 (Ct. Cl., 1947).

[24] Ibid., at 862. Contra: Lesner Plumbing & Heating Co., Inc. v. United States, 64 F. Supp. 931, 934 (N.Y., 1945). Compare Graves v. United States, 62 F. Supp. 231, 234 (N.Y. 1945), where just compensation was the "best available market for plaintiffs' property on the date of the taking" which was the Copper Recovery Program purchase price. Only these two federal district court cases have upheld such prices as market value. Compare Louisiville Flying Service, Inc. v. United States, 64 F. Supp. 938 (Ky., 1945).

[25] Pantex Pressing Machine, Inc. v. United States, 71 F. Supp. 859, 862 (Ct. Cl., 1947).

[26] Ibid., at 863.

[27] It is significant that the court assumed that a substitute measure for market value should include, in addition to cost, a fair profit. In application of the usual rule, loss of business good will, or profits, incidental to a taking, are generally held not to be compensable, either on the ground that such loss is not a part of the value of the property taken, or that such losses are too speculative to be considered. Orgel, Valuation Under Eminent Domain §§ 71, 74, 75, 76 (1936). In the Blake case, the court denied a cost-plus-reasonable-profit measure suggested there by the government. It said plaintiff was entitled to a "full and just equivalent," but, "Cost plus a reasonable profit may be more or less than an equivalent. . . ." C. G. Blake Co. v. United States, 275 Fed. 861, 867 (D.C. Ohio, 1921).

In Neumaticos Goodyear, S.A. v. United States, 73 F. Supp. 969, 972 (Ct. Cl., 1947), just compensation was found to be the average of many individually computed prices, which had been paid by the government in its purchases of idle rubber under the Surplus Stocks Program, plus a "fair mark-up for profit, to which we think it is entitled considering the risk incurred in the purchase and shipment of the rubber."

some type of cost figure must be adopted: original cost; out-of-pocket costs (analogous to reliance damages); cost plus a "fair" mark-up for profit (approximating expectation damages); or replacement cost, as was suggested in the *Felin* case.[28] The difficulty with replacement cost in most of these wartime cases is that it may be impossible to replace the requisitioned property at any price, and the attempt to compute what replacement cost *would be* may lead a court into the very type of conjecture which it must seek to avoid. If a court attempts to use original cost, it will undoubtedly find itself confronted with several alternative cost figures each based on a different set of accounting assumptions, and each valid, given its own premises.[29] In any case, a measure of value based upon cost cannot be as satisfactory a measure as that based upon market price. To move from price to cost in the determination of value is to move out of the market place and onto the balance sheet, where the "speculative approximation and guesswork"[30] of cost accountancy reign. A reasonably objective measure is replaced by a relatively subjective one.

The difficulties encountered in determining just compensation from a consideration of such subjective factors can be seen in the failure of the courts in some cases to articulate the basis of their findings.[31] To avoid these difficulties and preserve the virtues of the market value rule, the court in one case[32] treated the market price prevailing before the imposition of controls as the value of the property at the time of the taking. Considering the uncertainties

[28] Replacement cost was the measure adopted by the Court of Claims. Felin & Co., Inc. v. United States, 67 F. Supp. 1017 (Ct. Cl., 1946). The property involved was a quantity of pork products. In view of the problem of joint costs in a business producing no single major product, Justice Frankfurter ruled replacement cost to be a "spurious" measure of value. United States v. Felin & Co., Inc., 334 U.S. 624, 632, 640 (1948).

[29] For example, the cost of inventories may be priced under LIFO, FIFO, or averaging methods of accounting. The costs of identical commodities could thus differ by wide margins, according to the system employed. When there is a determinable market value, there may be a great divergence between the cost and value figures. There would probably be even greater disagreement and confusion over the original cost of "joint-cost" products. See opinion of Justice Frankfurter in United States v. Felin & Co., Inc., 334 U.S. 624–42 (1948). Compare Hamilton, Cost as a Standard for Price, 4 Law & Contemp. Prob. 321 (1937).

[30] United States v. Felin & Co., Inc., 334 U.S. 624, 634 (1948).

[31] In Harris & Co. v. United States, 69 F. Supp. 129 (Ct. Cl., 1947), the plaintiff had held a contract, subsequently cancelled because of government regulations, to sell metal rods at $5.50 per cwt. Later, when the OPA approval of sales was required, that body allowed a sale of part of this stock at $3.47 per cwt. An OPA ceiling was then established at $2.75 per cwt. The "fair and reasonable value" of the rods upon requisitioning was found to be $3.23 per cwt. Although the court took notice of some deterioration in the metal, it did not reveal the basis of its figure, which is two-thirds the way from the $2.75 ceiling to the $3.47 authorized selling price.

In Illinois Pure Aluminum Co. v. United States, 67 F. Supp. 955 (Ct. Cl., 1946), the court found just compensation "from all the facts and the circumstances" of the case to be $36,420.10, where original cost had been $45,918.07; replacement cost, $42,847.18; the original government award, based on its purchase program price, $30,781.83; and the plaintiff's claim, $45,045.25. Again, the basis of this valuation is not revealed.

[32] Arkansas Valley Ry., Inc. v. United States, 68 F. Supp 727 (Ct. Cl., 1946).

inherent in the alternative method of cost valuation, can it be conclusively demonstrated that the last prevailing free price is less satisfactory as a measure of value?

But an orderly approach to the problem of valuation for just compensation in a regulated market is possible. The rationale which attempts to explain the market value rule in terms of competitive buying in a free market should be abandoned. It is suggested, rather, that under the logic which requires compensation to be "just to the public as well as to the owner,"[83] market value should be viewed as just compensation because it awards the owner the best price he could obtain for his property in the general market, at the same time placing a limit on the price which the public (i.e., the government) must pay. It is also the most objective and most easily determined standard of value. According to this rule, in a competitive but inflated (or deflated) market, the measure of just compensation is the prevailing market price, although such price may seem "abnormally" high (or low) relative to the owner's costs and his prospective profits (or losses).

This rule should be extended to the controlled market, where the government fixes the ceiling price at which trading may proceed: the prevailing market price, although probably the ceiling price, is the appropriate measure. It has never been considered important that a particular market price may reflect market control by a monopolist.[84] If the government should adopt anti-inflation market controls in the course of war, the prevailing price in such a controlled market should be accepted as the appropriate measure of value. It is an objective standard, provided the predominant purpose of the government is not to acquire property at the fixed prices. It is easily determined, and it awards the owner the maximum legal price obtainable for the property, without the necessity of resorting to hypothetical "markets."

The owner may argue that, were it not for the taking, he would have a right to retain his property until the restrictions were lifted, at which time, presumably, the property could be used or sold to better advantage than presently possible; and that this right to retain is an element of value to be compensated for. The answer to this argument is that, since neither the time during which controls will be continued nor the state of the market at the expiration of controls can be accurately determined, the value of the right to retain is speculative, to say the least. Assuming, however, that the right to retain could be accurately valued, an award of such value would result in discrimination in

[83] C. G. Blake Co. v. United States, 275 Fed. 861, 867 (D.C. Ohio, 1921). Compare the Second War Powers Act of 1942, which restricted compensation for taking to that which the Fifth Amendment enjoins. 56 Stat. 176, 181 (1942), 50 App. U.S.C.A. §§ 631, 636a (1944).

[84] See Illinois Pure Aluminum Co. v. United States, 67 F. Supp. 955, 957 (Ct. Cl., 1946), where it is said, "For a number of years the market price for aluminum was largely governed by the price list of the Aluminum Corporation of America, which controls a large part of the production of aluminum. From this company most of the users of aluminum secured their supplies." Presumably, absent the wartime regulations, such market price would be just compensation within the terms of the Fifth Amendment.

favor of those whose property is taken by eminent domain, against those who sold on the market at the fixed ceiling price.[35]

In the Court of Claims, Judge Madden has written, in dissent, a strong argument for treating a fixed market price as the proper measure of just compensation:

> The Court holds that the Government . . . to make just compensation, must pay more than its valid law would have permitted anyone else to pay. And the evidence on which the higher price is based is that, before the price was put under control, the higher price prevailed, and that, in the opinion of an expert, when price control should have been removed, the higher price would, again, prevail.
>
> This evidence does not seem to me to be helpful. Pecuniary values are the product of many factors, and, particularly in wartime, some of the most important factors are the actions of Government. . . . [T]hese factors are actual, and lawful, and, I think, should not be disregarded by resort to a hypothetical situation in which they do not exist. Besides, I think it is inequitable and discriminatory . . . to pay the person, whose property happened to be requisitioned by the Government, more than his fellow, who sold his property in the market, could lawfully charge or accept.[36]

As noted previously, the "lawful actions of Government" in the wartime market may extend beyond the anti-inflation measures of price-fixing. When the government prohibits the use or sale of vital materials for any but authorized purposes, and, having thus limited the market, establishes a "program price" at which it is hoped the goods will voluntarily flow to authorized users, the proper measure of just compensation under the suggested rationale would be the program price. This would be true although it be shown that the government had fixed a price lower than that which prevailed on the free market immediately before the imposition of controls. The predominant purpose was not to take the property affected by the controls; it was to establish the least inflationary price at which transfers of vital goods would expeditiously be made to authorized war contractors.[37] This being so, the price can be said to be a reasonably objective measure of value; it is easily determined; it awards the

[35] In addition, it should be remembered that in establishing price control, Congress provided means of direct attack upon those ceilings which appeared unjust to affected owners. Compare Justice Reed's opinion in United States v. Felin & Co., Inc., 334 U.S. 624, 646 (1948). In United States v. Delano Park Homes, Inc., 146 F. 2d 473, 474 (C.C A. 2d, 1944), the issue involved the effect to be given government building priorities in valuing land which the owner had intended to use in a housing program. Judge L. Hand said, "When competent authority has fixed prices at a maximum, or has denied owners some specific use of their property, it is patently a disregard of its authority . . . to allow the price to be figured in disregard of the limitation imposed." It is suggested in OPA Ceiling Prices as Evidence of Value, 60 Harv. L. Rev. 132, 133 (1946), that the "prohibition of the Act against selling . . . in violation of OPA price regulations might be . . . applicable to requisitions . . . since 'selling' is defined to include 'sales, dispositions, exchanges, leases, and *other transfers*.' "

[36] Arkansas Valley Ry., Inc. v. United States, 68 F. Supp. 727, 731 (1946).

[37] In case of aluminum, 98 per cent of the holders of aluminum stocks in this country sold 96 per cent of their holdings to the government at such a program price. Pantex Pressing Machine, Inc. v. United States, 71 F. Supp. 859, 862 (Ct. Cl., 1947).

owner the maximum price legally obtainable in the market; and it avoids confusing expeditions into the realm of cost accountancy.

A final, but unlikely, hypothetical case may be dealt with. Were the government, in a proper situation, to impose unqualified restrictions upon the use or sale of given property, the value of such property would be zero if the "right to retain" until the lifting of restrictions were denied. Under the analysis adopted here, "just compensation" would require the government to pay the owner no more than the value of the property at the time of taking, i.e., zero. Before it is objected that such a result would be as unconscionable as the case would be unlikely, it should be pointed out that the government may, by valid restrictions, destroy property value and not be required to compensate for such destruction. For example, the refusal of the government to allocate essential raw materials to a manufacturing plant (when other manufacturers similarly situated are receiving allocations) may force a shutdown of the plant. If the plant has no alternate uses, its entire value is the present value of the prospective earnings after the lifting of the restrictions upon allocation—the value of the "right to retain." Ignoring this, its present value is zero. There is no question that the closed plant suffers a complete loss of what would be current profits, as well as out-of-pocket expenses and depreciation charges, for the time it is forced to remain idle. But "[i]t is not sufficient that damages have resulted or that hardships have occurred. War inevitably produces hardships, suffering, and losses, some of which cannot be measured in money. Legitimate war powers must be exercised, whatever the cost."[38] Thus, ". . .when governmental powers are legitimately exercised for the public good, and the injury complained of is only incidental to their exercise, there is no taking of property for the public use."[39]

In refusing to compensate for the destruction of the value of a plant's production during the enforcement of restrictions, the courts employ a distinction between "incidental damages," which cannot be compensated for, and a physical "taking" which must be compensated for.[40] Under the present analysis, which ignores the value of the right to retain, not only the destruction of value incidental to the lawful exercise of regulatory powers, but also the direct physical taking of property the value of which has been so destroyed, would be noncompensable. However, in the extreme case under consideration, where the "present" value (the only alternative price presently available) is zero, it is

[38] St. Regis Paper Co. v. United States, 76 F. Supp. 831, 833 (Ct. Cl., 1948), cert. den. 335 U.S. 815 (1948).

[39] Morrisdale Coal Co. v. United States, 55 Ct. Cl. 310, 316 (1920), aff'd 259 U.S. 188 (1922), quoted in St. Regis Paper Co. v. United States, 76 F. Supp. 831, 833–34 (Ct. Cl. 1948), cert. den. 335 U.S. 815 (1948).

[40] A discussion of the concept of "taking" is contained in Cormack, Legal Concepts in Cases of Eminent Domain, 41 Yale L.J. 221 (1931). It is there urged that if condemnees are to be fully compensated and the losses inflicted in promoting the "public use" are to be distributed throughout the community, the concept of "taking" must not be restricted to a physical meaning.

unlikely that this analysis would be rigorously applied by the courts. In this case, no more than in the other cases, can the value of the right to retain be determined. But it seems more probable that nonperishable property will have some value upon the lifting of controls, and that the controls will be lifted. The courts would undoubtedly find compensation due in such a case.

The same considerations could be applied to certain cases involving the government program prices. These prices were not directly reviewable as were the OPA ceiling prices. Consequently, where the program price is so low as to amount merely to a fiat price, the resulting situation is essentially the same as where trading is completely restricted.

If in cases like the above there is to be compensation, its measure should be free from confusion and easily determinable. In view of the completely speculative nature of retention value, the best rule-of-thumb in such circumstances would probably be to award the last quoted market price for the property, whether it be the price of a free or controlled market.

MIGRATORY DIVORCE IN AUSTRALIA AND THE UNITED STATES

Recent decisions and discussions have emphasized abundantly the acuteness of the country's interstate divorce problem.[1] Perhaps a study of the fundamental aspect of the problem, the theory of "states' rights" to control divorce policy, coupled with a brief restatement of the uncertainty a "Nevada" decree casts upon subsequent legal relations of the parties may serve to accentuate its pressing nature as well as the difficulties of achieving a solution. It does not seem necessary to repeat all that has been said of attempted American solutions and the reasons for their failure. However, for the purpose of clarifying the American situation, a rather detailed discussion of the history of interstate divorce in the Commonwealth of Australia is attempted here. Although, to be sure, the Australian treatment cannot be realistically advanced as a solution for this country, the differences and similarities of the two legal systems on this problem have been phrased in terms of possible American adoption of the Australian program. The strength of this comparative method is founded on similarities between the legal systems of the two nations. Both spring from the same common law and are affected insofar as jurisdiction in divorce is concerned by similar constitu-

[1] Estin v. Estin, 334 U.S. 541 (1948); Williams v. North Carolina, 325 U.S. 226 (1945); Llewellyn, Behind the Law of Divorce, 32 Col. L. Rev. 1281 (1932); Powell, And Repent at Leisure, 58 Harv. L. Rev. 930 (1945); Lenhoff, The Rationale of the Recognition of Foreign Divorces in New York, 16 Fordham L. Rev. 231 (1947); J. M. Radin, The Interstate Divorce Problem, 69 N.J. L.J. 233 (1946). For an interesting decision shedding light upon early conflicts problems when states based jurisdiction variously on domicile, place where the cause of action arose, place of marriage, see Ditson v. Ditson, 4 R.I. 87 (1856). Footnote 13 of Justice Frankfurter's dissent in Sherrer v. Sherrer, 334 U.S. 343, 364 (1948), traces briefly recent attempts to solve the problem.

tional and statutory provisions. Both operate in dual state-federal governmental organizations.

The most fundamental and characteristic feature of the problem of divorce jurisdiction is common not only to the jurisprudence of the United States and Australia but is universal. It arises from the fact that the dissolution of a marriage not only affects the immediate parties but is a matter in which the entire community feels that it may claim a legitimate interest. This notion finds expression in the statement that the "state is a party to a marriage contract." Indeed, the state writes the contract. To render of value the otherwise legally unenforceable promise of the parties to "love, honor, and obey," common law and statutes speak of conjugal "rights," the "right" of dower, community property "interests," the "duty" to cohabit and to support. These implied rights and duties benefit the married couple, to be sure. But, since marriage performs functions which society, in its absence, would be at loss to perform for itself, the state gains a reward of its own by insisting on the implication of these terms. Through the marriage home, for example, the state gains many separate institutions where its younger generations may be fed, clothed, refined into socially compatible and socially responsible individuals. Because social custom treats marriage as a regulator of sexual conduct, the state is freed of much conflict of men over women. For the wife marriage is, in a very real sense, a sort of old age insurance, a means of support "independent of continuing sex charm."[2] In addition, the problems of adjustment and concession intrinsic in successful marital partnership provide the essentially selfish nature of the normal individual a launching point for growth of the spirit of community co-operation and good citizenship.

To protect these interests in the proper functioning of marriage, society does not want divorce made "too" easy. Unrestrained divorce would sanction marriage intended only to legitimize otherwise illicit relationships. On the other hand, divorce is an instrument which salvages matrimonial wreckage. It enables the non-offending spouse to look elsewhere for happiness and security and gives the state an opportunity to profit by the renewed marital capacity of two citizens. To the extent that divorce is made "too" difficult that opportunity is denied. It thus becomes apparent that the wise state will draw a line somewhere in the middle ground between divorce laws which it deems "too" strict and those "too" liberal.

In the United States, as everyone knows, forty-eight state legislatures lay down various "grounds" for divorce. Few of the lines thus independently determined between the laws "too" strict and those "too" liberal are drawn at the same place, either in statutory law or in practice.[3] Tendencies toward "strict" divorce in some areas have been explained by the existence of predominating

[2] Llewellyn, Behind the Law of Divorce, 32 Col. L. Rev. 1281, 1290 (1932). This article suggests the argument in the text concerning the place of marriage in modern society.

[3] Statistics, note 48 infra.

religious or national groups, in others by the conservatism of rural populations.[4] On the other hand frontier states were influenced toward more liberal rules by early shortages of women.[5] Whatever the merits of these influences, the American community does not yet seem prepared to dismiss the notion that each state should be allowed to make up its own mind about divorce. It is felt that the divorce law of one state should be compulsory on the "domiciliaries" of that state. As a corollary it is said that the courts of the individual states should not dissolve the marriage of a stranger to the state unless it appears that there has been established ". . . a nexus between person and place of such permanence as to control the creation of legal relations of the utmost significance."[6]

From this "states' rights" theory arises the puzzling nature of the problem. A New Yorker, for example, who is given but one "ground" for divorce under the New York statutes, seeks more favorable law elsewhere. If he is fortunate a six weeks' stay in Nevada and an ex parte decree under Nevada's liberal divorce procedure will answer his problem. However, because Nevada can have no interest in his marital relationship unless Nevada can claim him as a "domiciliary," it is demanded of him by Nevada that he acquire "domicile" within that state through "six weeks' residence plus an intent to remain indefinitely." Such an intent his complaint alleges, but Nevada requires little proof of the pleading.[7] It is clear that the practice of "migration" has tended to evade the notions of the New York legislature about the marital institution. If allowed to go unchecked such a procedure would "cheat" and importantly change New York law.[8] However, a means is presented whereby New York may vindicate her policy. Repeatedly it has been said that New York need not by any constitutional mandate of "full faith and credit" recognize the Nevada court's finding of domicile as binding upon it.[9] Legal terminology says that the Nevada court had "no

[4] Groves, Migratory Divorce, 35 Law & Contemp. Prob. 293, 295 (1935).

[5] That this was the initial reason for Nevada's liberality, see Ingram and Ballard, The Business of Migratory Divorce in Nevada, 35 Law & Contemp. Prob. 302, 303 (1935).

[6] Williams v. North Carolina, 325 U.S. 226, 229 (1945).

[7] "It may be a matter of common knowledge that his home and his business are in New York, but no specific questions are asked as to why he left New York or came to Nevada and filed his case by the stop-watch. The courts have no hesitancy in accepting this general statement as establishing the good faith of his residence. . . ." Ingram and Ballard, The Business of Migratory Divorce in Nevada, 35 Law & Contemp. Prob. 302, 308 (1935).

[8] "Of what use would it be for State 'A' to require domicil as a condition of jurisdiction in divorce and to allow divorces only for desertion for three years, if neighboring State 'B' allowed divorce for bad temper and required only service of process within the territory of State 'B' and then State 'A' were compelled by the full faith and credit clause to recognize that its citizens had been duly divorced in State 'B'?" Harris v. Harris (1947) V.L.R. 44; Powell, op. cit. supra note 1, at 957.

[9] "To permit the necessary finding of domicil by one State to foreclose all States in the protection of their social institutions would be intolerable." Williams v. North Carolina, 325 U.S. 226, 232 (1945).

power over the individual or the subject matter." The "nexus between person and place," domicile, was lacking. In any future New York litigation her courts may, if they wish, treat Nevada's ex parte decree as a nullity.[10]

It goes almost without saying that the ability of one state or country to declare that one of its citizens is married when another state says that he is not complicates life for the individual seriously. But unfortunately these complications are not confined to those who consciously seek to avoid the laws of their own states. Justice Jackson, dissenting in *Estin v. Estin*, pointed out that "today many people who have simply lived in more than one state do not know [rules of law which will enable them to tell whether they are married or not and, if so, to whom] and the most learned lawyer cannot tell them with any confidence. The uncertainties that result are not merely technical, nor are they trivial; they affect fundamental rights and relations such as the lawfulness of their cohabitation, their children's legitimacy, their title to property, and even whether they are law-abiding persons or criminals."[11] The drive to eliminate the "uncertainty" mentioned by Justice Jackson and the "states' rights" theory discussed above compose the competing elements of the interstate divorce problem. The uncertainties will be discussed briefly under four major divisions.

Uncertainty begins, of course, when the court seeks to determine the bona fides of a man's "intent" to remain in the foreign state. Justice Rutledge, dissenting in the second *Williams* case, pointed up the difficulty:

> The very name [domicile] gives forth the idea of home with all its ancient associations of permanence. But "home" in the modern world is often a trailer or a tourist camp. The automobile, nation-wide business and multiple family dwelling units have deprived the institution, though not the idea, of its former general fixation to soil and locality. But, beyond this, "home" in the domiciliary sense can be changed in the twinkling of an eye, the time it takes a man to make up his mind to remain where he is when he is away from home. He need do no more than decide, by a flash of thought, to stay "either permanently or for an indefinite or unlimited length of time."[12]

[10] Of course, wherever sincere domiciliary intent is found, constitutional full faith and credit must be given the foreign decree. This is so regardless of variance in divorce law between the state rendering the decree and the state testing its power to do so. Sherrer v. Sherrer, 334 U.S. 343 (1948); Coe v. Coe, 334 U.S. 378 (1948). This is so regardless of the fact that the defendant did not appear before the foreign court and was not personally served process within the rendering state. Williams v. North Carolina, 317 U.S. 287 (1942), overruling Haddock v. Haddock, 201 U.S. 562 (1906).

[11] 334 U.S. 541, 553 (1948).

[12] Williams v. North Carolina, 325 U.S. 226, 257 (1945). Justice Black, in the same case, carries the notion further: ". . . a divorced person's liberty, so far as this North Carolina statute [penal offense for bigamous cohabitation] is concerned, hinges on his ability to 'guess' at what may ultimately be the legal and factual conclusion resulting from a consideration of two of the most uncertain word symbols in all the judicial lexicon, 'jurisdiction' and 'domicile.'" Ibid., at 277.

Although objective indicia may be plentiful, the test remains subjective in the close case. For this reason a simple term of residence within the foreign state has been suggested as a substitute jurisdictional criterion.[13]

If domiciliary intent is lacking, the home state need not by any constitutional requirement recognize a foreign decree which purports to divorce one of its citizens. It may do so if it wishes, however. The permissive nature of this recognition gives rise to a second sort of uncertainty. Each state may choose all, any, or none of three very different principles, on a descending scale of strictness, to guide it in the matter: res judicata, estoppel, comity. As between the parties to a foreign divorce action, if both appear and the question of domicile is litigated before the foreign court, neither can attack collaterally the decree's jurisdictional recital. Res judicata applies.[14] Even where the nonprocuring spouse appears in the foreign state and fails to litigate the issue of domicile, some courts declare the matter to be res judicata if a fair opportunity to litigate was presented but ignored.[15] Other states refuse unless the matter was thrashed out in an adversary proceeding.[16] Some states estop the nonprocuring spouse who makes no appearance at all if there appears evidence of acquiescence in the foreign divorce by remarriage[17] or acceptance of an agreement to support.[18] The liberal use of principles of comity by New York courts has had the effect of broadening the grounds for divorce in that state.[19] On the other hand, legislative mandate has ordered Massachusetts courts to refuse comity under all circumstances. There an "evasion" statute declares, in effect, that if a Massachusetts inhabitant goes to another state for the purpose of obtaining a divorce for a cause which occurred in Massachusetts or for a cause which would not authorize divorce under Massachusetts law, the courts of that state shall treat the foreign decree as a nullity.[20] Other states have followed suit.[21]

[13] Ibid., at 256; Powell, op. cit. supra note 1, at 1010. For an opposing view see J. M. Radin, The Interstate Divorce Problem, 69 N.J. L.J. 233, 247 (1946).

[14] Estin v. Estin, 334 U.S. 541 (1948); Coe v. Coe, 334 U.S. 378 (1948); Stoll v. Gottlieb, 305 U.S. 165 (1938); Davis v. Davis, 305 U.S. 32 (1938); Baldwin v. Iowa State Traveling Men's Ass'n., 283 U.S. 522 (1931).

[15] Glaser v. Glaser, 276 N.Y. 296, 12 N.E. 2d 305 (1938); Tiedemann v. Tiedemann, 225 N.Y. 709, 122 N.E. 892 (1917), writ of error dismissed 251 U.S. 536 (1919); Kinnier v. Kinnier, 45 N.Y. 535 (1871). Contra: Solotoff v. Solotoff, 269 App. Div. 677, 53 N.Y.S. 2d 510 (1945); In re Lindgren's Estate, 293 N.Y. 18, 55 N.E. 2d 849 (1944).

[16] Cohen v. Cohen, 319 Mass. 31, 64 N.E. 2d 689 (1946).

[17] Carbulon v. Carbulon, 293 N.Y. 375, 57 N.E. 2d 59 (1944).

[18] Schacht v. Schacht, 295 N.Y. 439, 68 N.E. 2d 433 (1946).

[19] Glaser v. Glaser, 276 N.Y. 296, 12 N.E. 2d 305 (1938).

[20] Mass. Ann. Laws (1933) c. 208, § 39.

[21] Me. Rev. Stat. (1944) c. 153, § 66; N.J. Rev. Stat. (1937) tit. 2, c. 50, § 35; Wis. Stat. (Brossard, 1947) § 247.21. Early decisions of the Supreme Court held these acts constitutional. A citizen who left his state "for the purpose" of divorce could not meet the jurisdictional requirement of domicile ("presence with intent to remain") necessary to place the foreign decree under the protection of the full faith and credit clauses. Andrews v. Andrews, 188 U.S. 14 (1902); see Coe v. Coe, 316 Mass. 423, 55 N.E. 2d 702 (1944), overruled 334 U.S. 373 (1948);

Since res judicata or estoppel can apply only to the immediate parties to the divorce action, uncertainty is multiplied by the possibilities of third-party attack.[23] Thus, for example, participants in marriage subsequent to a colorable divorce have been allowed decrees of nullity on grounds of the marital incapacity of their spouses. Generally nullity decrees have been granted where the remarried party was not the plaintiff in the prior proceeding[24] and occasionally where he was.[24] Such a decree has been granted even where the petitioning party advised and aided the other to obtain the questionable divorce.[25] Under present law if the divorced wife of the first marriage was before the court and litigated the problem of domicile, she could not later collaterally attack.[26] However, if she appeared but did not litigate, or if she did not appear, the first wife might deprive a second wife of letters of administration or dower rights in the decedent husband's estate. Where the first wife has not acquiesced by her own remarriage or by receiving benefits based upon the foreign decree she is almost sure to succeed.[27] In some jurisdictions she may succeed despite acquiescence.[28]

Langewald v. Langewald, 234 Mass. 269, 125 N.E. 566 (1920). Recent decisions of the Supreme Court, however, have seriously impaired the efficacy of these statutes where both husband and wife left the state and litigated the issue of domicile. Coe v. Coe, 334 U.S. 378 (1948); Sherrer v. Sherrer, 334 U.S. 343 (1948). An interesting bit of uncertainty occurred in connection with the revision of such a statute in the State of Delaware. Delaware's "evasion" statute used much the same language as the Massachusetts statute above. Del. Rev. Code (1935) § 3525. A 1945 amendment read, "Full faith and credit shall be given in all Courts of this State to a decree of annulment of marriage or divorce by a court of competent jurisdiction in another State, Territory or possession." 45 Laws of Del. (1945) c. 225. In State v. Nixon, 46 A. 2d 874 (Del. Gen. Sess., 1946) the Court admitted, arguendo, that the 1945 amendment demanded full faith regardless of domicile. However, in State v. Long, 59 A. 2d 545 (Del. Gen. Sess., 1948) the Court interpreted "competent jurisdiction" to mean jurisdiction over the subject matter and parties, as well as statutory power of the court to act in divorce. Thus a remarried foreign divorcee was convicted of bigamy.

[23] ". . . those not parties to a litigation ought not to be foreclosed by the interested actions of others. . . ." Williams v. North Carolina, 325 U.S. 226, 230 (1945).

[24] De Marigny v. De Marigny, 81 N.Y.S. 2d 228 (S. Ct., 1948); Davis v. Davis, 279 N.Y. 656, 18 N.E. 2d 301 (1938). Contra: Bane v. Bane, 80 N.Y.S. 2d 641 (S. Ct., 1948).

[25] Jackson v. Jackson, 274 App. Div. 43, 79 N.Y.S. 2d 736 (1948). But cf. Mumma v. Mumma, 194 P. 2d 24 (Cal. App., 1948) (Mexican divorce). The rule in the case last cited, by denying a nullity decree to the second wife of a husband who has procured a foreign divorce decree, places the second wife in a precarious position upon the death of her husband. His former wife may deprive her of rights under intestacy statutes as well as her rights to community property in those states which continue to recognise such an interest. As will appear, the benefits of Social Security may be denied her, as well as insurance with private firms. If her husband's will read "to my wife," without mention of his second wife's name, there is no reason why the first wife could not substantiate a claim under the will, leaving the second wife penniless. A nullity decree is her only protection against insecurity after her husband's death. A denial seems unreasonable.

[26] Jackson v. Jackson, 274 App. Div. 43, 79 N.Y.S. 2d 736 (1948).

[27] Coe v. Coe, 334 U.S. 378 (1948); Sherrer v. Sherrer, 334 U.S. 343 (1948).

[28] Rice v. Rice, 134 Conn. 440, 58 A. 2d 523 (1948) (First wife takes administration of husband's estate from second wife); Vaughan v. Vaughan, 25 N.J. Misc. 340, 53 A. 2d 625 (1947) (Second wife deprived of dower rights by first wife).

[28] True of the Mexican divorce cases: In re Hensgen's Estate, 181 P. 2d 69 (Cal. App.,

Children of the first marriage have been allowed to question the second marriage on grounds of the invalidity of the first divorce in order to eliminate the second spouse as sole intestate heir of their father[29] or to obtain an adjudication that their father's will had not been revoked by his remarriage.[30] Occasionally litigation seeking similar ends has failed if the decedent father procured the prior divorce, since the children are estopped, as their father would have been.[31] A child conceived to the first couple after dissolution of their marriage has succeeded in establishing his legitimacy.[32] However, in one case, children of a prior marriage of a husband have not been able to attack the status of his later wife on grounds that a divorce which she obtained from her first husband was invalid.[33] In one interesting situation the court allowed the first wife to contest the decedent's mother's intestacy rights.[34]

The state may always question the second marriage on the basis of invalidity of a prior divorce. Such actions may take the form of bigamy prosecutions.[35] A recent case in which the Social Security Board refused payments to the second wife of a deceased Mexican divorcee illustrates other possibilities of confused and uncertain status.[36] There seems no reason why private insurance companies could not similarly attack the validity of a migratory divorce decree. Executors of the estate of the second wife of a husband-divorcé have successfully attacked his rights to survivorship in joint tenancy property.[37] Another novel situation allowed a nonprocuring husband to escape a suit for specific performance of a land contract on grounds that a previous invalid divorce left his wife's dower rights intact.[38]

Occasionally a fourth type of uncertainty lies in the fact that a divorce decree may be valid in some respects, invalid in others. Thus, though a Florida decree

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1947); In re McNutt's Estate, 98 P. 2d 253 (Cal. App., 1940); cf. Kelsey v. Miller, 203 Cal. 61, 263 Pac. 200 (1928).

[29] Olmstead v. Olmstead, 190 N.Y. 458, 83 N.E. 569 (1908), aff'd 216 U.S. 386 (1910); German Savings & Loan Society v. Dormitzer, 192 U.S. 125 (1903).

[30] In re Lindgren's Estate, 293 N.Y. 18, 55 N.E. 2d 849 (1944); In re Sayle's Estate, 80 N.E. 2d 221, 229 (Ohio App., 1948) (Children failed since evidence inconclusive).

[31] Shea v. Shea, 270 App. Div. 527, 60 N.Y.S. 2d 823 (1946).

[32] Urquhart v. Urquhart, 272 App. Div. 60, 69 N.Y.S. 2d 57 (1947). One wonders what the status of the second wife and her children then must be.

[33] In re Davis' Estate, 38 Cal. App. 2d 579, 101 P. 2d 761 (1940), rehearing denied 102 P. 2d 545 (1940).

[34] In re Bruneman's Estate, 32 Cal. App. 2d 606, 90 P. 2d 323 (1939).

[35] Williams v. North Carolina, 325 U.S. 226 (1945). For a collection of editorial comment on the Williams decision see 91 Cong. Rec. 5179 (1945).

[36] Sherman v. Federal Security Agency, Social Security Board, 70 F. Supp. 758 (N.J., 1947) noted in 15 Univ. Chi. L. Rev. 220 (1947).

[37] Kelsey v. Miller, 203 Cal. 61, 263 Pac. 200 (1928).

[38] McCreery v. Davis, 44 S.C. 195, 22 S.E. 178 (1895).

has been effective to establish in each participant a renewed capacity to marry, it was held invalid insofar as it purported to grant custody of children who were not within the jurisdiction of the court.[39] A decree permitting remarriage has been held impotent to alter post-marriage obligations to support.[40]

It has been said that uncertainty "is merely one of those untoward results inevitable in a federal system"[41] which permits forty-eight state governments to establish and protect forty-eight different divorce policies. The consequent confusion and personal hardship have brought forth four recognizable patterns of possible solution. The first, a Uniform State Divorce law, has failed to gain acceptance by state legislatures in all but three states.[42] The second, a recent Uniform Divorce Recognition Act, is not likely to achieve greater success. The differences, for example, between Massachusetts policy and New York policy in granting extraterritorial effect to decrees unprotected by the full faith and credit clauses would seem to make such a statute impractical even in its current "rule of evidence" form.[43] The theory of these two solutions seems fundamentally in error in that it is dependent upon individual state action. It seems difficult to expect state lawmakers to volunteer action in matters as politically explosive as marriage and divorce policy.

The third and fourth solutions call for federal intervention rather than voluntary individual state action. Under the Constitution Congress has the power to "prescribe the manner in which [the judgments of one state, appearing in the forums of another] shall be proved, and the effect thereof."[44] Thus Congress might enact legislation similar to that of the Judiciary Act of 1790 but special to the circumstances of divorce.[45] Under this power legislation substantially codifying present case law was presented to the 80th Congress.[46] The fourth solution

[39] In re Biggers, 228 N.C. 743, 47 S.E. 2d 32 (1948).

[40] Estin v. Estin, 334 U.S. 541 (1948); Davis v. Davis, 70 Colo. 37, 197 Pac. 241 (1921).

[41] Williams v. North Carolina, 325 U.S. 226, 237 (1945).

[42] That changes in divorce law frighten Australian as well as American politicians, see 149 Commonwealth of Australia Parliamentary Debates 597 (1936), quoting Law Inst. J. 185 (1934): "The particular part about the matter [of uniform divorce law] is that, although most people favor the idea, the question is continually shelved and looks like remaining shelved until there is sufficiently powerful agitation to force the Commonwealth's hand. All political parties seem afraid that by introducing a bill they will rend asunder their party. . . ."

[43] Section 1 of the Uniform Divorce Recognition Act is similar to the Massachusetts Act, note 21 supra. It provides that no sister-state divorce decree shall be effective within the enacting state if the parties were domiciled within that state at the time of commencement of proceedings. It thus renders impossible application of doctrines of estoppel or comity by the judiciary. The second section of the Act provides that a) resumption of residence within the enacting state within eighteen months, or b) continual maintenance of a place of residence within the enacting state shall be prima facie evidence of retention of domicile by a resident of the enacting state who has sought a foreign divorce.

[44] U.S. Const. Art. 4, §1.

[45] 1 Stat. 122 (1790), 28 U.S.C.A. § 687; Sherrer v. Sherrer, 334 U.S. 343, 364 (1948); Powell, op. cit. supra note 1, at 1011. Other authorities are collected in 94 Cong. Rec. 60 (1948).

[46] Senator McCarron of Nevada seeks passage of a statute designed to extend validity to decrees which are questionable under present law. S. 1960, 80th Cong. 2d Sess. (1948).

would require a constitutional amendment giving the federal government full power to legislate in matters of marriage and divorce. A clear understanding of the possibilities and effect of securing such an amendment may be gained, perhaps, by examining the Australian legal system as it touches the subject.

Until quite recently Australian divorce recognition law was surprisingly analogous to that of the United States. Variance in "grounds" for divorce between the Australian States,[47] while not as great as that existing between the United States,[48] was substantial.[49] The jurisdictional criterion, as in all common-law countries, was the elusive concept "domicile."[50] As in the United States, the extraterritorial effect of a sister-state decree depended on the power of the rendering court over the parties and the subject matter,[51] despite constitutional and statutory full faith and credit provisions.[52]

Here the similarities end, however. The differences in the constitutional, statutory, and judge-made law of the two nations, substantial as subsequent dis-

[47] Among the Australian States and Territories, adultery is a ground for divorce in all 10; habitual drunkenness, 9; imprisonment, 9; frequent convictions for five years, 9; attempt on spouse's life, 9; rape, sodomy, bestiality, 9; insanity, 7; desertion, three years, 8; desertion, five years, 2; incestuous adultery, 4; repeated assaults and beatings, 7; failure to obey maintenance decree or agreement, 4; failure to comply with restitution decree, 4; separation, 2; wife's pregnancy at marriage, 1. Grounds for Divorce, 19 Aust. L.J. 333 (1946).

[48] Out of fifty-four American jurisdictions reported in 3 Nelson, Divorce and Annulment, 615–47 (2d ed. 1945), adultery is a ground for divorce in 53; imprisonment, crime, felony, 45; cruelty, severity, 43; desertion, 36; impotency, 35; habitual drunkenness, 34; abandonment or neglect, 33; insanity, mental illness, 26; separation, 17; prior pregnancy, 14; former marriage, bigamy, 12; intemperance, 11; drugs, 11; mental suffering, 9; indignities, 8; injurious treatment, violence, 7; fraudulent contract, 5; attempting life of spouse, 4; outrages, 4; force, duress, 4; continual absence, 4; wilful absence, 4; consanguinity or affinity, 4; wife libel, defamation, 3; foreign divorce, 3; mental incapacity, idiocy, 2; vagrancy, 2; fugitive, 2; crime against nature, 2; incompatibility, 2; venereal disease, 2; anti-cohabitation beliefs, 2; violent temper, 2; corruption, prostitution, 1; prior prostitution, 1; wickedness, 1; separation and non-support, 1; void or voidable marriage, 1; null and void marriage, 1; under age marriage, unconfirmed, 1; leprosy, 1; false prostitution charge, 1. In South Carolina, the only state prohibiting divorce at the publication of Nelson's second edition, a recent referendum voted to amend a 63-year-old constitutional ban, to permit divorce on grounds of physical cruelty, desertion, habitual drunkenness, or adultery. N.Y. Times, p. 2, col. 3 (Nov. 3, 1948).

[49] 184 Commonwealth of Australia Parliamentary Debates 4833, 4837 (1945); 149 ibid., at 592, 597 (1936).

[50] LeMesurier v. LeMesurier, (1895) A.C. 517; Bell v. Bell, 181 U.S. 175 (1901); Barber v. Barber, 21 How. (U.S.) 582 (1858). Australian decisions: Kane v. Kane, (1939) Q.W.N. 58; Slater v. Slater, (1928) S.A.S.R. 161; Donald v. Donald, (1899) 9 Q.L.J. 211.

[51] Mackenzie v. Manwell, 20 W.N. (N.S.W.) 18 (1903); D'Arcy v. Ketchum, 11 How. (U.S.) 165 (1850); Thompson v. Whitman, 18 Wall. (U.S.) 457 (1873).

[52] The Commonwealth Constitution provides: "Full faith and credit shall be given throughout the Commonwealth to the laws, the public acts and records, and the judicial proceedings of every State." Aust. Const. Act, § 118 (1900). Compare U.S. Const. Art. 4, § 1. Implementation of this clause by Parliament followed the provisions of an American Act: "All public acts, records and judicial proceedings of any State or Territory . . . shall have such faith and credit given to them in every Court and public office as they have by law and usage in the Courts and public offices of the State or Territory from whence they are taken." State and Territorial Laws and Records Recognition Act § 18 (1901–34), 1 Commonwealth Acts 957 (1935). See 1 Stat. 122 (1790), 28 U.S.C.A. 687.

cussion will show them to be, might be explained on purely sociological grounds. The root of America's problem lies, of course, in the fact that certain jurisdictions have made a business of migratory divorce.[53] This policy has made all sister-state decrees suspect. But Nevada has never had an Australian counterpart. Perhaps the relatively small Australian population has rendered a divorce center impractical as a tourist business proposition. Perhaps the relative homogeneity of that population in matters of religion, culture, and occupation is manifested in remarkably similar laws on divorce.[54] "Strict" law in one state has not made migration necessary or inviting. Lack of extremely "liberal" practice in another has left a domiciliary of a "strict" state with no place to go for more sympathetic law.

The constitutional differences must be discussed, interestingly enough, as the outgrowth of an Australian desire to avoid the development of a "Nevada" within the Commonwealth. The debates of the Australian Constitutional Convention reveal this comment: "If there is one blot which stands out more than another in the American Constitution it is that, by their Constitution, they are not able to deal with this [divorce] question in a uniform way; and we know that this has led to a condition of things socially of a most deplorable character. Persons who, according to the law of the state in which they reside, would have no chance of being divorced, may become domiciled in another state by living there a certain time and then, according to the laws of that state, may obtain divorce for reasons which, in their own state, would have been ludicrous as a ground of divorce."[55] Thus urged, the Convention adopted provisions granting the federal parliament power to seize all legislative and judicial power in marriage and divorce and to provide uniform divorce law throughout the nation.[56] The Ameri-

[53] "Before six o'clock this morning the county clerk's office began receiving divorce complaints for filing. At noon 170 cases were on file and the total approached 300 before the office closed at night. . . . Two judges will start issuing decrees Monday in the uncontested cases brought today. The judges expect to grind them out at the rate of one every ten minutes and hope to clear up the grist of business by Wednesday." This, regarding Nevada's divorce business, appeared in the Philadelphia Record (May 3, 1931).

[54] One notices an absence of mention of collusion as an element which might distinguish the statute law of a particular state from its practice. The absence of collusion might be explained by the presence of the Crown Proctor or Crown Solicitor who represent the interests of the state by investigating questionable divorce litigation. Amber v. Amber, (1937) S.A.S.R. 27; Stat. N.S.W. No. 14, § 30 (1899); Matrimonial Causes Act of 1875 (Qnsld.) § 7; Matrimonial Causes Act 1929–36 (S.A.) Pt. IV, §§ 25, 26.

[55] Australaian Federal Convention Debates 1080 (1897); Quick and Garran, Annotated Constitution of the Australian Commonwealth 610 (1901).

[56] Aust. Const. Act § 51 (xxii), § 77 (ii). "Reno has become possible in the United States of America because there was no general control of marriage and divorce legislation in that country. The framers of our Constitution no doubt had in mind the scandal that existed in America, where each state has its separate divorce laws, and where there was no possibility of federal control. . . . If one Australian State did make conditions of divorce so attractive that people might be expected to flock to it to obtain divorces, this Parliament could effectively counteract such action. . . ." 149 Commonwealth of Australia Parliamentary Debates 592, at 596 (1935–36).

can Constitution is unfortunately silent as to these matters and they remain the province of the state governments.[57]

A discussion of the statutory differences demands a prefatory word explaining another distinction between the laws of the two countries. Under the "unitary domicile" principle of Australian law a wife could not obtain a domicile separate from that of her husband.[58] Thus when an Australian wife was deserted by a husband from another Commonwealth State, the courts of her own state were unable to grant her a divorce and the financial burden of following her husband often spelled an unseverable tie. To remove this hardship many Australian states had passed local statutes providing separate domicile for the deserted wife.[59] However, there was serious doubt whether divorces granted without conventional domicile could have extraterritorial effect, either among the Commonwealth States or outside the Commonwealth.[60] To remove the possibilities of uncertainty of status thus arising, the first permanent[61] federal statutes under the constitutional provisions above discussed were enacted.[62] A nation-wide Australian domicile was created for the purposes, at least, of divorce jurisdiction. This federal jurisdiction was vested in the state courts.[63] It might be invoked by any Australian domiciliary, whether husband or wife, who proved one year's residence in the forum state.[64] The state domicile notion and the theory that a state should be allowed to control the marital contracts of its domiciliaries have not entirely lost their force, however. This is so since the law which the "resi-

[57] U.S. Const. Amend. 10; McCarty v. Hollis, 120 F. 2d 540 (C.C.A. 10th, 1941).

[58] For criticism of unitary domicile: Lord Advocate v. Jaffey, (1921) 1 A.C. 146; Salvesen v. Administrator of Austrian Property, (1927) A.C. 641, 669–70. Contra: Barber v. Barber, 21 How. (U.S.) 582 (1858).

[59] New South Wales Matrimonial Causes Act of 1899 § 16; South Australian Matrimonial Causes Act of 1929 § 43; Victoria Marriage Act of 1928 § 75; Western Australia Supreme Court Act § 71 (1935); Tasmania Matrimonial Causes Act § 9(5) (1860), inserted by Matrimonial Causes Act § 3 (1919).

[60] Schache v. Schache, (1931) S.R. (N.S.W.) 633, 638; Domicile in Divorce, 2 Aust. L.J. 183 (1928); An Australian Matrimonial Domicile, 9 Aust. L.J. 425 (1936); Chia v. Chia, (1921) V.L.R. 566; 184 Commonwealth of Australia Parliamentary Debates 4350, 4785, 4833 (1945); Isaacs, J., in Fremlin v. Fremlin, (1913) 16 C.L.R. 212, at 230: "Uncertainty in matrimonial relations is altogether to be deprecated and it is a scandal . . . when a man and a woman are held to be man and wife in one country and strangers in another. . . . I would wish to draw the attention of the Commonwealth Parliament to the question."

[61] Temporary Acts were passed during both World Wars in order to enable Australian wives to obtain divorces from their British and American husbands without the necessity of following the servicemen to their foreign domiciles. Matrimonial Causes (Expeditionary Forces) Act (1919); 17 Commonwealth Acts 66 (1920); Matrimonial Causes Act (Cth., 1945); 184 Commonwealth of Australia Parliamentary Debates 4350, 4785, 4833 (1945); Black v. Black, (1946) Q.W.M. 50.

[62] Matrimonial Causes Act (Cth., 1945), commented on, McWilliam, The Matrimonial Causes Act, 19 Aust. L.J. 330 (1946).

[63] Aust. Const. Act § 77 (iii).

[64] Matrimonial Causes Act § 10 (Cth., 1945); Caldwell v. Caldwell, (1946) S.A.S.R. 185; Stevens v. Stevens, (1946) V.L.R. 283.

dence" court must apply is that of the state of domicile.[65] Certainty of effect is breathed into the decree of the "residence" court by a provision that any divorce granted under the Act is to be "of the same force and effect as if that judgment" had been given by the court of domicile.[66]

The advantages of the legislation are clearly seen. It reconciles what early portions of this note referred to as the competing notions of "states' rights" and the drive for certainty. It leaves to the states a type of "local option" in deciding how marriages are to be dissolved. Federal power is present but unexercised. At the same time a divorce decree enjoys a high degree of validity when brought into the courts of another state. Paraphrased in American terms, it would be possible for a Nevada court to give a New Yorker temporarily present in Nevada a decree entitled to "full faith and credit" anywhere in the United States providing that it applied the New York substantive divorce law.

The objection to American adoption of such an act lies, of course, in the fact that a Nevada court might be disposed to find a fictitious Nevada domicile in order to give the petitioner relief under Nevada's more liberal practice. But it must not be forgotten that a constitutional amendment giving the federal government ultimate powers to exclude state variance in marriage and divorce law would be a necessary precursor of American adoption of the Act. Under such an amendment Nevada and other states like her would have "everything to lose and nothing to gain" by continued migratory divorce practice. If Nevada voluntarily gave up her migratory divorce business she would retain the right to stipulate divorce policy for her own domiciliaries. If Nevada persisted in fictitious findings of domicile for the benefit of her tourist trade, the Congress would deprive her of the business as well as rights over her own citizens by passing a federal substantive divorce law.

The difficulties of constitutional amendment in the United States would be the greatest obstacle to successful adoption of the Australian program. Almost perennial attempts have been made to secure an amendment relating to divorce and thus far they have failed.[67] At one pole these attempts are met by opinions from strong anti-divorce regions whose constituents found their beliefs on religious faith. At the other stands the Nevada business man, for whom the liberal divorce law and practice of that State are matters of competition for the tourist trade. It might seem that legislators who truly reflected the desires of either polar group could not conscientiously support a constitutional change which

[65] Matrimonial Causes Act § 11 (Cth., 1945). "Practice and procedure" is to be that of the forum court, not the court of domicile. The form of a decree nisi and the period to elapse between the decree nisi and the decree absolute is a matter of "practice and procedure" under the Act. White v. White, (1947) V.L.R. 434; Tullett v. Tullett, (1947) Q.W.N. 55. Contra: Green v. Green, (1947) Q.W.N. 16.

[66] Matrimonial Causes Act § 13 (Cth., 1945).

[67] Justice Frankfurter states that, beginning in 1884, almost seventy constitutional amendments concerning marriage and divorce law have been proposed. Sherrer v. Sherrer, 334 U.S. 343, 364 n. 13 (1948).

would compromise either strictness or liberality for a federal middle ground. And yet, apart from churches and business men and other peculiarly interested groups, one must believe that a substantial majority of Americans could reach a high degree of unanimity concerning divorce. For example, the prevalence of collusive divorce in the strict jurisdictions argues that state legislators are out of step with the demand for liberalization of divorce law.[68] It is true, also, that old historical reasons for variance, such as the frontier's shortage of women and the conservatism of rural areas are disappearing. Modern communication and transportation are substantially intermingling the populations of the various states and should in time create an attitude toward divorce even more homogeneous than that which prevails at present among the general population.

In discussing the distinctions between American and Australian case law in this field, it might seem unjustifiable to dwell on a decision of an isolated state court which is so contrary to accepted principles that it cannot yet be said to indicate a representative trend. But the Victorian Court's decision in *Harris v. Harris*[69] is interesting in that it reveals Australian judicial nonchalance at the exact point which is crucial to the American problem. In that case a petitioner for divorce revealed to the court that his first wife had obtained a previous divorce in New South Wales. However, no evidence was presented that the petitioner had ever lost his Victorian domicile and had become a domiciliary of New South Wales, a prerequisite to the acquisition of jurisdiction by the New South Wales court under Australian unitary domicile principles.[70] If jurisdiction was lacking, the prior decree was not entitled to extraterritorial effect. Such a result would follow from both the common law and the American interpretations of full faith and credit clauses. The petitioner's first marriage subsisted. There was no second marriage capable of dissolution by the Victorian Court. Yet, after a careful review of the American decisions, Justice Fullager decided that the statutory "full faith" provisions,[71] if not the constitutional clause,[72] altered the common law and commanded him to recognize the validity of the New South Wales decree even though given without jurisdiction.

The American bar will wonder how Justice Fullager might have reached such

[68] "[F]ree consent divorce exists in the United States as a fact. Not as a divorce-mill phenomenon alone. But as a standard practice of divorce, to the tune of 100,000 cases annually or more, throughout the country." Llewellyn, Behind the Law of Divorce, 33 Col. L. Rev. 249, 285 (1933).

[69] (1947) V.L.R. 44, noted in 2 Int. L.Q. 21 (1948); 21 Aust. L.J. 358 (1947); Morison, Extra-territorial Enforcement of Judgments Within the Commonwealth of Australia, 21 Aust. L.J. 298 (1947). Perry v. Perry, (1947) V.L.R. 470 (semble).

[70] The New South Wales Matrimonial Causes Act of 1899 § 16, provided for separate domicile of *deserted* wives. However, the petitioner's former wife brought the New South Wales action on grounds of adultery under § 15 of that act which required the petitioner's domicile within the state at the relevant time.

[71] State and Territorial Laws and Records Recognition Act § 18 (1901–34); 1 Commonwealth Acts 957 (1935).

[72] Aust. Const. Act § 118.

a conclusion. His opinion reveals that he was apprised of the American difficulty. Three reasons have already been suggested.[73] A fourth explanation appears in the differences between Australian and American case-law interpretation of the "full faith" clauses. *D'Arcy v. Ketchum*[74] and *Thompson v. Whitman*[75] did not have Australian counterparts. From what can be determined at so great a distance from Australia, Australian courts had not expressly said, as did the American courts in the cases referred to above, that the "full faith" clauses did not apply to recitals of jurisdictional facts contained in foreign state decrees. It seems that the notion of collateral attack on grounds of want of jurisdiction was simply accepted by Australian lawyers and that they had previously paid little attention to the mandates of the clauses which, by their terms are certainly sufficiently broad to deny such attack.[76] In Australian divorce cases reference to "full faith" is to be found only once prior to the *Harris* decision. In *Jones v. Jones*[77] a dissenting opinion expressed belief that the clauses demanded recognition of an ex parte decree when valid in the state where rendered. This apparent vacuum of decision made it easier for Justice Fullager to exercise discretion in the matter.

Although it seems safe to assume that the *Harris* case will affect only the recognition of divorce decrees and will not intrude upon such fact situations as that presented in the American case of *Thompson v. Whitman*,[78] it is interesting to note that the decision importantly affects the working of the Act discussed above. Its scope is sufficiently wide to forestall collateral attack on a sister-state's finding of the required one year's residence as well as an attack on the finding of domicile for the purposes of determining the applicable law.

But perhaps the outstanding feature of the decision for purposes of comparison is its easy recognition of a rule which dissolves entirely the "uncertainty" aspects of the American dilemma. It demonstrates in a very real way that the notion of "states' rights" which in America competes with the desire to eliminate "uncertainty," is of relatively minor importance in Australian judicial thought on this subject. Once again the absence of an Australian "Reno," the lack of variation in divorce policy among the Commonwealth states and the constitu-

[73] 1) Absence of variance in social policy concerning divorce among Australian States. 2) Absence of the problem which would have been presented by an Australian "Reno" and an underground railroad of migratory divorce. 3) Probability that Australia would never be confronted with the "Reno Problem" since the Commonwealth Parliament had ultimate power. These were suggested by Justice Fullager's opinion. Harris v. Harris, (1947) V.L.R. 44, 58.

[74] 11 How. (U.S.) 165 (1850).

[75] 18 Wall. (U.S.) 457 (1873).

[76] Perhaps one reason for this lack of attention is the statutory method of sister state judgment execution in Australia. Service and Execution of Process Act (1901–34). Under a similar statutory method attack was surely allowed prior to the Constitution and its full faith and credit clause. Donald v. Donald, (1899) 9 Q.L.J. 211. After it, attack was allowed without reference to the clauses. Kane v. Kane, (1939) Q.W.N. 58.

[77] (1928) 40 C.L.R. 315, aff'd (1928) V.L.R. 24.

[78] 18 Wall (U.S.) 457 (1873).

tional power of the federal Parliament to act in the field are thrown into sharp contrast with what Australians must deem the unfortunate situation in the United States.

GUILT BY ASSOCIATION—THREE WORDS IN SEARCH OF A MEANING

I

In those days they shall say no more. The fathers have eaten a sour grape and the children's teeth are set on edge. But every man shall die for his own iniquity; every man that eateth the sour grape, his teeth shall be set on edge.[1]

The Nuremberg trials, the President's Loyalty Order, and the recent efforts to obtain convictions of Communist Party leaders have evoked criticism by lawyers and laymen alike. The brunt of these attacks has been directed at the techniques employed to establish the criminal responsibility of persons affiliated with associations and groups whose activities have been felt to endanger national security. Writers criticizing these efforts have employed a phrase which has recently become an important addition to the popular vocabulary—guilt by association.[2] The emotional responses evoked by the phrase arise not alone from the highly charged character of the words themselves but also from the fact that they are used to describe highly controversial proceedings. While the term is employed in an increasing variety of situations, few have devoted any serious effort to assign it any clear meaning.

That guilt by association is a concept repugnant to Anglo-American notions of justice is explicable to some extent from the tacit assumption that "it is of the very essence of our deep rooted notions of criminal liability that guilt be personal and individual."[3] The doctrine of personal guilt has no clear historic origin, and unlike other major assumptions of the common law, it has been the subject of little or no inquiry. While British and American experience has displayed some consciousness of class and family discrimination, the absence of any rigid caste structure has permitted the development of a legal system which tends to evaluate rewards and punishments in terms of individual achievement

[1] Jeremiah 31:29–30.

[2] For judicial references to guilt by association see Justice Murphy, concurring in Bridges v. Wixon, 326 U.S. 135, 163 (1945); Dunne v. United States, 138 F. 2d 137, 143 (C.C.A. 8th, 1943), cert. den. 320 U.S. 790 (1943). For discussions of the doctrine of guilt by association as it relates to special problems see Chafee, Free Speech in the United States 470–84 (1941); Emerson, Loyalty Among Government Employees, 58 Yale L.J. 1, 91–94 (1948); O'Brian, Loyalty Tests and Guilt by Association, 61 Harv. L. Rev. 592 (1948); Gellhorn, Report on a Report of the House Committee on Un-American Activities, 60 Harv. L. Rev. 1193, 1217–24 (1947); Constitutionality of the Taft-Hartley Non-Communist Affidavit Provision, 48 Col. L. Rev. 253, 261–63 (1948); Wechsler, The Issues of The Nuremberg Trial, 62 Pol. Sci. Q. 11, 21–23 (1947); Guilt By Association, University of Chicago Round Table No. 573 (Mar. 13, 1949).

[3] Sayre, Criminal Responsibility for Acts of Another, 43 Harv. L. Rev. 659, 717 (1930); see Knauer v. United States, 328 U.S. 654, 669 (1946); Kotteakos v. United States, 328 U.S. 750, 772 (1946); Schneiderman v. United States, 320 U.S. 118, 136 (1943).

and delinquency. Contemporary Anglo-American standards of individual responsibility, however, have by no means been universal. The attaching of guilt or responsibility for criminal acts upon the family or clan of the offender is a characteristic of both primitive societies and totalitarian states.[4] English legal history itself provides examples of murder-fines and blood feuds predicated upon notions of collective guilt or associate responsibility.[5] Modern Anglo-American law, however, has for the most part abandoned these early practices in favor of a theory of punishment more consonant with a political and economic pattern of individual freedom. Our legal system and our common sense would be opposed to "making one man pay for another man's wrong, unless he has actually brought the wrong to pass. . . . unless, that is to say, he has induced the immediate wrongdoer to do acts of which the wrongs, or, at least, wrong was the natural consequence under the circumstances known to the defendant."[6]

If personal guilt is a major premise underlying the criminal law, can it be said that "guilt by association" is a useful term to describe situations which involve departures from personal guilt? In civil actions, it is a well accepted principle that the doctrine of respondeat superior may be used to impose upon the employer responsibility for the negligent acts of his servants committed during the course of employment. It was early decided, however, in the case of *Rex v. Huggins* that the principal is not answerable criminally for the acts of his agent without the principal's consent, authorization, or knowledge.[7] The shifting of the burden of loss to consumers, which is a principal justification for the application of the doctrine of respondeat superior, has no legitimate application to the criminal law. While the doctrine of *Rex v. Huggins* has been generally accepted in this country, several significant exceptions may be noted. To aid effective police enforcement, employers have frequently been held responsible for their agents' violations of public welfare statutes.[8] Liability in these cases has been imposed despite the employer's ignorance of the alleged offenses or the agent's disregard of contrary instructions.

In close parallel to this rather special extension of criminal liability is a series of cases which hold that a corporation may be held guilty of any crime committed by its human agents within the course of their employment, as tested by the

[4] Code of Hammurabi § 230 (If a builder has by his bad work, caused the death of a son of the owner of the house, the builder's son shall be put to death); Diamond, Primitive Law 277–300 (1935).

[5] 1 Maitland, The Laws of Wales—The Kindred and the Blood Feud, in Collected Papers 202–29 (1911); ibid., The Criminal Liability of the Hundred, at 230–46; 1 Pollock and Maitland, The History of English Law Before Edward I, § 8, at 678 (2d ed., 1899); see City of Chicago v. Sturges, 222 U.S. 313 (1911) (upholding constitutionality of a statute imposing absolute liability upon a community when private property is injured through mob violence).

[6] Holmes, Agency, 5 Harv. L. Rev. 1, 14 (1891).

[7] 22 Strange 882, 93 Eng. Rep. 915 (K.B., 1730).

[8] See Baty, Vicarious Liability 198 (1916); Sayre, Public Welfare Offenses, 33 Col. L. Rev. 55 (1933).

standards applicable to ordinary tort liability.[9] Since a corporation can act only through its agents, and as the shareholders are the persons primarily punished when a corporation is convicted, corporate criminal liability is necessarily vicarious.[10] The liability of the individual or corporate employer for a minor class of criminal acts committed by agents is, in a sense, a guilt arising from a business association, and a departure from any conventional concept of personal guilt. No one, however, has suggested the use of the term "guilt by association" to describe these well accepted forms of business liability.

A more familiar example of imputing to the accused the criminal act of another—someone with whom he forms a peculiar association—arises in the case of the criminal conspiracy.[11] Conspirators may be found guilty not only of the conspiracy itself, but of any of the substantive crimes arising from or in furtherance of the conspiracy. The accused's participation in, knowledge of, or approval of, the specific substantive offense is not prerequisite to his liability for the crimes of a fellow conspirator. A person who associates with others for the purpose of accomplishing some unlawful end, may, under well accepted principles of criminal conspiracy, be held guilty of a crime committed by someone he has never met, at a place which he has never attended.[12]

There is an apparent inconsistency between these three examples of vicarious criminal liability and the doctrine of personal guilt, for ordinarily one is not guilty of a crime unless he is aware of the existence of facts which make his conduct criminal. It is this awareness that is embodied in the concept of mens rea, the "criminal intent," necessary to demonstrate guilt.[13] Yet it is not always necessary to prove even this general intent. In a felony murder charge, for example, a man may be guilty without a showing of any intent to commit murder; the fact that he has engaged in a felony dispenses with the need of proving intent to kill. A man tried for statutory rape need not be aware of his victim's age; he takes his chances. Where the accused's conduct is itself unlawful, he is said to assume the risk that that element or manifestation of the activity which he has ignored may in fact exist.[14]

The rationale underlying these examples of extended criminal liability is derived from the doctrine of personal responsibility for the natural consequences of one's acts. The theory of punishment underlying the criminal law is seen to rest upon the principle of causation—men being guilty not only for their own

[9] See Egan v. United States, 137 F. 2d 369, 379 (C.C.A. 8th, 1943), cert. den. 320 U.S. 788 (1943); Vulcan Last Co. v. State, 194 Wis. 636, 643, 217 N.W. 412, 415 (1928).

[10] Lee, Corporate Criminal Liability, 28 Col. L. Rev. 1, 13 (1928); Francis, Criminal Responsibility of the Corporation, 18 Ill. L. Rev. 305, 308 (1924).

[11] Pinkerton v. United States, 328 U.S. 640, 646–47 (1945); Vicarious Liability of Co-Conspirators, 56 Yale L.J. 371 (1946).

[12] See State v. Ritter, 197 N.C. 113, 147 S.E. 733 (1929); 2 Wharton, Criminal Evidence, § 699 (1935).

[13] Lebitt, The Origin of the Doctrine of Mens Rea, 17 Ill. L. Rev. 117 (1922).

[14] United States v. Crimmins, 123 F. 2d 271, 272 (C.C.A. 2d, 1941).

unlawful acts, but for the forseeable unlawful consequences of their voluntary activities.[15] The criminal character of private acts stems from the public's interest in the positive or negative consequences of those acts; that is to say, from certain events by which they are followed.[16] A man may therefore be personally guilty of a crime if he performs the forbidden act, if he aids in or abets its commission, or if the specific crime with which he is charged is a probable and natural consequence of his own unlawful conduct.[17]

With this reminder of what Anglo-American lawyers mean when they speak of personal guilt, it is possible to examine the specific circumstances in which the issue of guilt by association has arisen. All so-called cases of guilt by association may be seen to fall analytically into three distinctive categories—attempts to impute criminal liability, efforts to punish persons for the act of associating, and the use of evidence of an individual's associations to establish charges of disloyalty or subversion. Each of these merits separate consideration.

II

The first situation wherein the issue of guilt by association has arisen is in regard to those circumstances in which the unlawful acts or objectives of an organized society are imputed to an individual who in some manner associates himself with the society. The act of associating is not punished, but it becomes the basis for imposing vicarious criminal liability. It was noted above that criminal responsibility is normally attached to individuals the nature of whose activities causally relates to the substantive offense. Persons who encourage others to commit criminal acts and persons who knowingly set in motion a series of acts which with reasonable forseeability result in a crime, are themselves responsible for the ultimate consequences. The holding of persons criminally liable for the acts of others solely on the basis of their formal membership in a common group goes far beyond the general area of individual responsibility. If, for example, it is a statutory crime to advocate or teach the overthrow of an established government by force and violence, a conviction based solely on an individual's membership in a society dedicated to those purposes would violate both a rule of law and a rule of reason.

The rationale underlying a conviction of this sort would run something as follows:

"X" organization advocates the commission of an unlawful act.

The Defendant is a member of "X" organization.

Therefore, the Defendant advocates the commission of an unlawful act.

The Supreme Court has refused to attribute to one member the criminal

[15] 1 Burdick, Law of Crime, §§ 112–13 (1946); Sayre, Criminal Responsibility for the Acts of Another, 43 Harv. L. Rev. 659, 702–8 (1930).

[16] 1 Austin, Lectures on Jurisprudence 472 (1869).

[17] This rationale is expressed in the federal Criminal Code, 35 Stat. 1152 (1909), 18 U.S.C.A. § 550 (1940), which makes liable as a principal: 1) the direct actor, or 2) one who aids, abets, counsels, commands, induces, or procures the commission of the criminal act.

ideas or acts of other affiliates in a political party, and has insisted upon proof of the accused's own culpability.[18] Social and political organizations for the most part reflect a variety of objectives, and "men in adhering to a political party notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles."[19] It is difficult to ascribe character or motive to any amalgamate apart from the personalities and principles of its more dominant members. The amorphous structure of the American mass political party may be less characteristic of the more closely organized, highly disciplined society. The latter may display a more rigid adherence to specified political principles, yet the assignment of a criminal intent to all the members of an organized group results from a spurious identification with a fictitious group personality.[20] Spurious identification is a process whereby dissimilar objects are given common labels. The label is endowed with particular qualities, and these qualities are in turn attributed to the dissimilar components.[21]

The spurious identification process is not the only method by which association may become a basis for imputing criminal guilt. A more pernicious form of this technique may appear in criminal conspiracy charges.[22] The argument in these cases is:

"X" organization constitutes a criminal conspiracy.[23]

The Defendant is a member of "X" organization.

Therefore, the Defendant is a member of a criminal conspiracy.

The faulty logic in this sort of reasoning lies in the indiscriminate use of the term "member." The minor premise uses the term in the sense of formal enrollment on a membership list. The conclusion uses the term as a synonym for participant. The consequences of concluding the defendant's participation in the conspiracy are such as to permit his liability for the acts of co-conspirators. Once this relationship is established, the acts and declarations of his co-conspirators become admissible against him. The reasons for the conspirator's extended liability were discussed above. The concern here is with the use of evidence of association as grounds for establishing participation in a criminal conspiracy.

[18] DeJonge v. Oregon, 299 U.S. 353 (1937). But see Justice Butler, dissenting in Schneiderman v. United States, 320 U.S. 118, 197 (1943): "A man can be known by the ideas he spreads as well as the company he keeps." In United States v. Tapolcsanyi, 40 F. 2d 255, 257 (C.C.A. 3d, 1930), it was asserted that a defendant's principles "may be proved by showing the principles of the organizations he approved."

[19] Schneiderman v. United States, 320 U.S. 118, 136 (1943).

[20] Thouless, Straight and Crooked Thinking, c. 4 (1930); Chase, Spies and Semantics, 13 The Progressive, No. 2, at 19 (Feb., 1949).

[21] See Strecker v. Kessler, 95 F. 2d 976, 977 (C.C.A. 5th, 1938); Gellhorn, Report on a Report of the House Committee on Un-American Activities, 60 Harv. L. Rev. 1193, 1217–18 (1947).

[22] O'Brian, Loyalty Tests and Guilt By Association, 61 Harv. L. Rev. 592, 599–605 (1948).

[23] See Proposed House Res. 99, 80th Cong. 1st Sess. (1947). "Resolved: that Communism be defined and declared to be not a political policy, but is an international conspiracy and an anti-Christian ideology which advocates and practices deceit, confusion, subversion, and the subordination of man to the state. . . ." Whitney v. California, 274 U.S. 357, 371–72 (1926).

The secret character of most conspiracies makes proof of their existence by direct evidence extremely difficult. The existence of a conspiracy may, therefore, be inferred from manifest acts and no proof of an actual agreement is necessary.[24] To show the defendant's participation in the conspiracy, it has been held unnecessary to prove that the individual defendant was a party to the original agreement or fully aware of all its particulars.[25] Even with this broad view of conspiratorial participation, the difficulty of obtaining direct proof that the accused was in fact a party to the agreement is evident. For this reason, courts have permitted juries to draw broad inferences of the defendant's agreement and intent from evidence of acts, circumstances, and conduct.[26] Where a conspiracy is established, a slight quantum of evidence connecting the defendant therewith may be considered "substantial," and if so, sufficient.[27] The danger which may result from permitting such broad inferences to be drawn is that the defendant "might be found in the net of a conspiracy by reason of the relation of [his] acts to acts of others, the significance of which [he] may not have appreciated."[28]

In conspiracy charges, evidence of the relations of the parties, the nature of their acquaintance, and the frequency of their being seen together, may be considered by the jury.[29] The individual defendant's participation in or knowledge of the conspiracy may not, however, be inferred from his casual and unexplained meetings with other conspirators.[30] The defendant's affiliation with or membership in a group some of whose members are engaged in a criminal conspiracy may have some probative value. It should not, however, relieve the prosecution of its burden of clearly establishing the accused's participation in the conspiracy.[31]

The degree of proof necessary to show participation in a criminal conspiracy may, however, depend upon the nature of the offense charged. The liberality with which the courts have permitted the prosecution of business enterprises for engaging in conspiracies to monopolize or to restrain trade is the most significant example of this relaxation of proof. In attaching liability for violations of the

[24] Glaser v. United States, 315 U.S. 60 (1942); Madison v. United States, 165 F. 2d 507 (C.C.A. 10th, 1947).

[25] Coates v. United States, 59 F. 2d 173 (C.C.A. 9th, 1932); United States v. Wilson, 23 F. 2d 112 (D.C. W.Va., 1927).

[26] United States v. Anderson, 45 F. Supp. 943 (D.C. Cal., 1942); Oliver v. United States, 121 F. 2d 245 (C.C.A. 10th, 1941); Parente v. United States, 82 F. 2d 722 (C.C.A. 8th, 1936).

[27] McDonald v. United States, 89 F. 2d 128 (C.C.A. 8th, 1937); Marx v. United States, 86 F. 2d 245 (C.C.A. 8th, 1936).

[28] Justice Frankfurter, concurring in Von Moltke v. Gillies, 332 U.S. 708, 728 (1948).

[29] Lance v. State, 166 Ga. 15, 142 S.E. 105 (1928); People v. Childs, 127 Cal. 363, 59 Pac. 768 (1899); Reinhold v. State, 130 Ind. 467, 30 N.E. 306 (1892); Scott v. State, 30 Ala. 503 (1857).

[30] United States v. Falcone, 311 U.S. 205, 210 (1940); Ellis v. United States, 138 F. 2d 612 (C.C.A. 8th, 1943).

[31] The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants, 62 Harv. L. Rev. 276 (1948).

Sherman Act,[32] the courts have tended to direct their attention to the presence of proscribed activities instead of to the evidence of the accuseds' intent.[33] By engaging in concerted economic activities which operate in fact to restrain trade, the defendants may be charged with having agreed to effect the unlawful results, thereby making proof of a specific intent to restrain trade unnecessary.[34]

III

The second situation in which the issue of guilt by association has arisen is in regard to those circumstances wherein a statute makes the association itself a criminal act. Statutes designed to punish persons for associating with a group of individuals possessed of criminal records or bearing evil reputations have met with little success. An Illinois statute punishing as a vagabond anyone associating with persons bearing or reputed to bear criminal records was held unconstitutional.[35] While recognizing the necessity for a proper exercise of the state police power, the Illinois Supreme Court noted, "No legislative body in this country possesses the power to choose associates for citizens."[36] An ordinance of a similar character was invalidated by the Missouri Supreme Court.[37] A St. Louis ordinance penalizing, as an act of indecency, association on the streets or sidewalks by two or more persons of the opposite sex when one such person shall be of "ill repute" was held void as infringing the rights of personal liberty.[38] The New York Court of Appeals, while declaring that "mere association of people of ill repute with no intention to breach the peace or commit a crime is too vague a provision to constitute an offense," nevertheless upheld the constitutionality of a statute punishing one "who bears an evil reputation and with an unlawful purpose consorts with thieves and criminals" despite the additional statutory provision to the effect that "consorting with persons of like reputation, thieves or criminals, shall be prima facie evidence that such consorting was for an unlawful purpose."[39]

Statutes penalizing membership in or association with unlawful societies fall into several classifications. Membership in an association designated by name has rarely been the subject of punitive legislation.[40] The absence of such legis-

[32] 26 Stat. 209 (1890), 15 U.S.C.A. § 1 (1946).

[33] See Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933); United States v. Patten, 266 U.S. 525 (1913).

[34] United States v. Masonite Corp., 316 U.S. 265 (1942); Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939).

[35] People v. Belcastro, 356 Ill. 144, 190 N.E. 301 (1934).

[36] Ibid., at 303.

[37] City of St. Louis v. Fitz, 53 Mo. 582 (1873); City of St. Louis v. Roch, 128 Mo. 541, 31 S.W. 915 (1895); Ex parte Smith, 135 Mo. 223, 36 S.W. 628 (1896).

[38] Lancaster v. Reed, 207 S.W. 868 (Mo. App., 1919).

[39] People v. Pieri, 269 N.Y. 315, 199 N.E. 495, 498 (1936).

[40] Legislation which singles out a designated organization and makes it a crime to be a member thereof may operate as a legislative finding of guilt of a determinate class of persons and

lative specificity is due probably to the difficulty of effectively enforcing a statute of such character.[41] The passage of such regulation would stimulate the condemned society to change its name and resort to subterfuge.[42] A statute making past membership in a named society a criminal offense would operate as ex post facto legislation and run into constitutional difficulties. It is for these reasons that British and American statutes punishing affiliation with or membership in unlawful societies have defined these societies in terms of their objectives or methods of operation.[43]

American legislation punishing persons who join or associate with unlawful societies is most directly concerned with groups who advocate the overthrow of the government by force and violence.[44] The American statutes are of two types. The first is exemplified by the federal law penalizing persons who join "knowing" the purposes of the unlawful organization.[45] In the single instance in which this statute has been tested, the court dismissed the accused's contention that the legislation imposed guilt by association by pointing out that the statute did not include one who had joined while ignorant of the group's unlawful objectives and who remained passive and uninformed.[46] The second group of statutes relating to punishment for the act of associating are so phrased as to make any sort of membership unlawful. In the enforcement of this latter type

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thus come within the definition of the bill of attainder enunciated in United States v. Lovett, 328 U.S. 303 (1946); see Communist Party of the United States v. Peek, 127 P. 2d 889, 897 (1942).

Proposals designed to outlaw directly the Communist Party have been introduced but have as yet failed to secure passage; see H.R. 2122 § 2, 80th Cong. 1st Sess. (1947); Ill. S.B. 156 § 5 (1949).

As an example of how private groups have adopted the technique of making membership in the Communist party an explicit ground for expulsion see Const., Utility Workers Union of America (CIO), Art. 3, § 5 (1946); Const., United Cork, Linoleum and Plastic Workers of America (CIO), Art. 9, § 1 (1946).

[41] Letter, L. H. Phillips, professor of political science, Colo. State College of Education, N.Y. Times, § 4, p. 8E, col. 6 (May 11, 1947), relating to the unsuccessful Canadian experience with direct "outlawry" legislation.

[42] As an example of how legislatures may seek to avoid this difficulty, see H.R. 1884 § 2, 80th Cong. 1st Sess. (1947), which defines the Communist Party as "the political party now known as the Communist Party of the United States, whether or not any change is hereafter made in such name."

[43] Early British legislation in this field provided punishment for any member of an unlawful club or society or any person who directly or indirectly maintains correspondence or intercourse with such a society. 39 Geo. III, c. 79 §§ 2, 8, 9 (1799); 57 Geo. III, c. 19 § 25 (1817). Despite its loose wording and broad coverage, the British legislation has been used only rarely.

[44] Conduct Proscribed as Promoting Violent Overthrow of the Government, 61 Harv. L. Rev. 1215 (1948); Restraints on American Communist Activities, 96 U. of Pa. L. Rev. 381 (1948).

[45] 54 Stat. 671 (1940), 18 U.S.C.A. § 10(a)(3) (1940).

[46] Dunne v. United States, 138 F. 2d 137, 143 (C.C.A. 8th, 1943). Twelve leaders of the Communist Party of the United States have been indicted under this act. The trial began on January 17, 1949, and is still in progress. For text of the indictment see N.Y. Times, p. 9, col. 3 (Jan. 17, 1949).

of statute, a majority of courts have interpreted the legislation so as to require a showing of active membership to sustain a conviction.[47] A few courts have held that membership alone is sufficient.[48]

It has been argued that all statutes imposing liability upon persons who join unlawful organizations represent a legislative effort to establish guilt by association.[49] Keeping in mind the Anglo-American concept of personal guilt, it is possible to determine whether the cases falling within this category represent new departures from this concept. Without considering the wisdom of enacting "violent overthrow" statutes, or the finding of fact that "X" organization does or does not fall within the statutory definition, the question which needs to be answered is whether these statutes effect an extension of the area of criminal liability.

Where it is stipulated that the only persons who may be punished are those who associate with knowledge of the group's unlawful objectives, the legislature is in effect restating the requirements for the establishment of a criminal conspiracy. Agreement to effect an unlawful objective is the nub of the criminal conspiracy, and agreement may be evidenced by a showing of voluntary association with knowledge.[50] Punishment for conscious participation in an unlawful enterprise falls well within the area of personal guilt. The possible danger in applying this sort of legislation arises in connection with the evidence problem. If the fact of membership is itself sufficient to establish knowledge, then, of course, the courts would be effectively subverting the principle of liability arising from causation.[51] For the most part, however, the problem of properly proving knowledge in this sort of case is not materially different from that which arises in any case necessitating proof of the accused's knowledge.

Quite a different situation presents itself with regard to those statutes making membership itself a crime. It would seem that statutes of this sort are in effect legislative shortcuts designed to avoid the burden of establishing the defendant's knowledge. If knowledge of the group's unlawful program is made immaterial to the issue of the individual's guilt, then a person who joins an organization with wholly innocent motives may subsequently find himself held liable under the terms of a criminal statute as the result of a court finding that the particular group with which he has affiliated does in fact come within the statutory definition. The legality of the defendant's behavior will be judged retrospective to the court's determination of the quality of the group's behavior. Put to the task of

[47] See Shaw v. State, 76 Okla. Cr. 271, 134 P. 2d 999 (1943); People v. Lloyd, 304 Ill. 23, 88, 136 N.E. 505, 530 (1922).

[48] State v. Boloff, 138 Ore. 568, 4 P. 2d 326 (1931); State v. Lowery, 104 Wash. 520, 526, 177 Pac. 355, 356 (1918).

[49] See discussion relating to the Nuremberg Trial, Pt. IV infra.

[50] Harno, Intent in Criminal Conspiracy, 89 U. of Pa. L. Rev. 624, 646 (1941).

[51] Chafee points out that the courts in these circumstances have in practice required very little evidence to establish such knowledge. Chafee, Free Speech in the United States, 476–81 (1941).

guessing whether in joining a particular group he is exercising the lawful right of free association or committing a punishable offense, the individual is left with a doubt as to whether his conduct will be labelled gregarious or criminal.[52] Punishment under these circumstances is objectionable not because the statute imposes some new form of guilt which may be termed "guilt by association," but because this sort of legislation is of necessity vague and uncertain in its application. Its terms fail to inform those who are subject to its sanctions what conduct on their part will render them liable to its penalties.[53]

Statutes making association itself a crime may, as the statutes punishing association with persons of ill repute, offend the constitutional guarantees of individual liberty, or, as the statutes imposing liability on all members of a society advocating an unlawful program, be violative of due process for reasons of vague and uncertain application, but they do not extend the area of personal guilt. They are not usefully described as examples of guilt by association.

IV

The third situation wherein the issue of guilt by association has arisen is in regard to those circumstances in which evidence of an individual's general associations is used to subject him to public censure or to deny him some right or privilege granted by the laws. Applied in this sense, guilt by association is seldom used in reference to a criminal trial procedure. It is used most frequently to describe the procedures followed by "un-American activities committees" and administrative "loyalty boards." Individuals or groups against whom such evidence is offered are rarely subjected to any criminal punishment (they bear no legal guilt), but the social opprobrium and economic consequences which follow such investigative findings may be sufficiently serious as to be regarded as equivalent to a criminal conviction.[54]

The distinctive feature in each of the cases arising under this category is to be found in the nature of the purpose for which evidence of this sort is introduced. "Loyalty boards" and "un-American activities committees" are designed to ferret out individuals whose activities or sympathies are felt in some way to endanger the "national security." They are not primarily designed to handle

[52] A judicial finding that a specified organization is devoted to the use of force and violence would not be binding upon subsequent courts and should not operate, therefore, to charge defendants in subsequent cases with knowledge of the group's unlawful activities. There is no reported instance of a criminal proceeding in which the court has taken judicial notice of the unlawful programs of an organized society. In noncriminal proceedings, however, several federal courts seem to have taken judicial notice of the Communist Party's espousal of unlawful doctrines. In re MacKay, 71 F. Supp. 397 (Ind., 1947); United States ex rel. Fortmueller v. Comm'r of Immigration, 14 F. Supp. 484 (N.Y., 1936); Murdoch v. Clark, 53 F. 2d 155 (C.C.A. 1st, 1931).

[53] Connally v. General Construction Co., 269 U.S. 385, 391 (1925); see Lanzetta v. New Jersey, 306 U.S. 451 (1939); Herndon v. Lowry, 301 U.S. 242, 259 (1937).

[54] See Durr, The Loyalty Order's Challenge to the Constitution, 16 Univ. Chi. L. Rev. 298 (1949); Protection from Defamation in Congressional Hearings, 16 Univ. Chi. L. Rev. 544 (1949); Letter, Dean Griswold and Professors Scott, Katz, and Chafee of the Harvard Law School, N.Y. Times, § 4, p. 8, col. 5 (April 13, 1947).

cases involving violations of any statute relating to crimes against the sovereignty such as espionage, treason, or sedition. Presumably the existing law-enforcement agencies are best equipped to handle the traditional criminal charges.[55] The investigating committees are concerned with the "crimes" of "disloyalty," "un-Americanism," and "subversion." What activities or ideas may be included in these terms no one has successfully enumerated.[56] They would seem, however, to be used to describe a deflection from some prevailing standard of mental patriotism. Because of the feeling that finding an individual to be "disloyal" or "subversive" has consequences similar to finding him to be guilty of a criminal offense, it is not unreasonable to expect that no person should be made to suffer the social and economic penalties of an investigative determination unless it is clearly established that he was in fact "disloyal" or "subversive"—that he was personally at "fault."[57]

It is not meant here to determine the constitutional objections to imposing sanctions upon persons for their otherwise lawful behavior or speech, or to postulate the dangers inherent in the administration of such programs, but rather to analyze the applications of a much overworked phrase. Assuming that "disloyal" persons should be removed from public employment, and that "subversive" leaders in the ranks of government, business, and labor should be "exposed," what relevance does evidence of an individual's associations and habits bear to the determination of his "disloyalty," "un-Americanism," or "subversion"?

Criminal punishment must be based on more than a mere suspicion of guilt. Evidence of an individual's political habits and organizational activities which may create only a suspicion of "disloyalty" is to this extent similar to evidence of reputation. Neither would seem sufficient evidence upon which to base an adverse finding.[58] The common law has classed reputation evidence as hearsay and permits its introduction in criminal cases for rebuttal purposes only after the defendant has put his character in issue.[59] In face of this common-law tradition, any statute which permits the introduction of evidence of reputation to establish the probability of the defendant's guilt or which allows reputation to become prima facie evidence of guilt may be seriously questioned.[60] The barrier

[55] Emerson, Loyalty Among Government Employees, 58 Yale L.J. 1, 27–29 (1948).

[56] Ibid., at 36–53.

[57] "The fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal." United States v. Lovett, 328 U.S. 303, 314 (1946); see Bridges v. Wixon 326 U.S. 135, 163–64 (1945).

[58] McFarland v. American Sugar Refining Co., 241 U.S. 79 (1916). The Admissibility of Character Evidence in Determining Sentence, 9 Univ. Chi. L. Rev. 715 (1942).

[59] 1 Wigmore, Evidence § 193 (1940).

[60] Constitutional Validity of Statute Establishing Proof of Reputation as Prima Facie Evidence of Commission of Crime, 30 Mich. L. Rev. 600 (1932).

to the use of reputation as evidence for or an element of criminal offenses has not, however, been altogether impenetrable. Appeals based on the admission of evidence of reputation to prove violation of the prohibition laws have been denied.[61] Evidence to show a defendant's character as a gambler has been sustained.[62] Several states have statutes punishing persons who bear criminal reputations when these persons are found prowling around commercial or industrial areas.[63] Dean Wigmore has expressed the view that no constitutional principles prevent the enactment of legislation defining bad repute as an element of a crime.[64]

Evidence of political affiliations, social contacts, reading habits, and economic persuasion is the sort which is most frequently offered at hearings before the investigating committees.[65] Evidence of association is offered to establish circumstantial proof of the ultimate issue, "disloyalty," "un-Americanism," etc. Like circumstantial evidence in general, evidence of association is proferred to demonstrate circumstances from which the existence of the principal fact may be reasonably deduced or inferred.[66] Any particular act of association would, of course, be highly inconclusive in establishing an individual's deviation from any standard of "acceptable ideology," but taken together these isolated instances of social conduct may be sufficiently strong to establish probabilities from which the trier of fact may infer the ultimate issue. Evidence of association may then have a direct probative relation to the individual's personal ideological attachments.

The significant objection to the use of association evidence in investigative hearings, therefore, is not that proof of an individual's associates, habits, and affiliations is irrelevant to the ultimate issue of his personal political orientation. The objection may in reality be directed toward the propriety of the inquiry itself—the attempt to censure non-conformists—the use of such ambiguous charges as "disloyal," "subversive," or "un-American."[67] If one accepts the view that public security demands that persons attached to certain political theories be denied the opportunity to hold key positions in government, labor, or business, then the objection to the investigative proceedings may be that they base their findings on insufficient evidence, upon evidence which fails to meet the burden of proof necessary to establish beyond a reasonable doubt the accused's deflection from the "accepted ideologies." For once it is conceded that persons

[61] Anthony v. Commonwealth, 142 Va. 577, 128 S.E. 633 (1925); State v. Wilson, 15 R.I. 180, 1 Atl. 415 (1885).

[62] Thornhill v. State, 14 Ala. App. 647, 72 So. 297 (1916).

[63] Commonwealth v. Ellis, 207 Mass. 572, 93 N.E. 823 (1911); In re McCue, 7 Cal. App. 765, 96 Pac. 110 (1908).

[64] 4 Wigmore, Evidence § 1354, at 719–20 (1940).

[65] See examples collected in Emerson, Loyalty Among Government Employees, 58 Yale L.J. 1, 67–79 (1948).

[66] 2 Wharton, Criminal Evidence §§ 779–80 (1935).

[67] See note 36 supra.

who have not violated any existing criminal legislation may have sanctions imposed upon them because they adhere to potentially dangerous ideas, any group assigned to determine this issue would of necessity utilize evidence of association.

V

No court has attempted a judicial interpretation of the phrase "guilt by association," nor has it appeared in any nonlegal dictionary or phrase book. Yet "guilt by association" is rapidly becoming an important addition to the vocabularies of lawyers and non lawyers alike. Far too frequently the statement "this is a case of guilt by association" means nothing more than "this is a case I don't like." While it may be valuable to learn the speaker's attitude toward a particular set of facts, it should not be assumed that the employment of the term provides analytical insight into any legal process. Nor should any author assume that his readers are able to attach a common meaning or significance to the phrase. It has been used to criticize: 1) cases wherein the status of association serves as a basis for imputing criminal liability, 2) statutes which seek to punish persons for the act of associating and 3) investigations during which evidence of an individual's social contacts, political affiliations, and habits of conduct are introduced to establish charges of "disloyalty" or "un-Americanism." The importance of distinguishing between the three types of cases to which the phrase is applied proceeds from more than scholastic regard for neat verbal categorization. The problems presented by any one of the categories discussed above arise from essentially distinct considerations, and the indiscriminate application of the phrase "guilt by association" to all three types of cases tends only to obscure the factors which make any particular result an undesirable one.

The point may perhaps be best illustrated by reference to a specific example. Article IX of the Nuremberg Charter provided a procedure for declaring the criminality of the more important organizations in the Nazi hierarchy.[68] The concept of group criminality was advanced as a derivative of the Anglo-American theory of criminal conspiracy.[69] By regarding membership in a criminal group as equivalent to participation in a criminal conspiracy, the association might be used as a basis for imputing to the individual the crime of the group. A defendant might thus be held to the liability of a co-conspirator without any proof of his actual entry into the conspiratorial plan. Article X of the Charter provided for the punishment of individual members of these organizations. Membership alone was recognized as a crime and persons convicted under this provision were made liable to punishments ranging from the deprivation of civil rights to death.[70] The act of associating was regarded as punishable conduct, yet no regard was given to the question of whether or not the association was itself voluntary.

[68] The Nuremberg Charter appears in Trial of War Criminals, No. 2420 (Dep't. State, 1945).

[69] 2 Nazi Conspiracy and Aggression 16, 17 (1946).

[70] Allied Control Council Law No. 10, as contained in 15 Dept. of State Bull. 862 (1946).

Eminent commentators, however, have denied that the Nuremberg experiment imposed guilt by association.[71] The justification for their conclusions may be based upon the actual procedures adopted in the trial stage. The Tribunal specifically declared that membership alone was not enough to sustain an individual conviction and it limited the application of Article X to those members of the criminal groups who had not been conscripted and who either had personal knowledge of the unlawful character of the group's activities or had personally participated therein.[72] The burden of producing evidence as to each member's status was shifted to the prosecution and the design of the original Charter was effectively modified.

"Guilt by association" has no single clear meaning. It is not always used as an antithesis to personal guilt, for frequently situations so designated fall well within the concept of individual responsibility. The typical case of so-called guilt by association offends the Anglo-American tradition by permitting the imposition of punishment under vague and uncertain standards, or the utilization of insufficient evidence and false identity. If the cases are to be effectively criticized and corrected, an attempt should be made to identify more accurately their crucial defects.

The legal problems presented by the cases discussed above are in no sense unique. In many respects they have been recurrent throughout Anglo-American history. But having stated reasons for restricting the use of the term "guilt by association," it is not to be inferred that the social problem which the phrase seeks to describe is in any sense less serious or immediate. The one factor which may be said to be common to all so-called cases of guilt by association is that each poses a problem as to the extent to which the state may seek to control organized groups by imposing responsibility on individual participants. How best may it regulate anti-social group conduct without too severely limiting the rights of individual citizens?[73]

The American legal system like the American political structure was designed to operate in an atmosphere in which individual freedom and private initiative were the dominant principles of social organization. The contemporary development toward collective action expressed through the media of well organized economic, social, and political groups has caused the state increasingly to turn its attention to the anti-social designs of large associations. A political society must be provided with means by which to regulate the forces which fail to observe the rules of permissible conduct. If the offender is a private individual, he is termed an outlaw or criminal and his activities are restrained by enforcement of the criminal law. If violence to existing institutions is threatened by an or-

[71] Gellhorn, Report on a Report of the House Committee on Un-American Activities, 60 Harv. L. Rev. 1193, 1223 (1947); Jackson, The Law Under Which Nazi Organizations are Accused of Being Criminal, 19 Temple L. Q. 371, 378 et seq. (1946).

[72] Leventhal, the Nuernberg Verdict, 60 Harv. L. Rev. 857, 899 (1947).

[73] See the Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants, 62 Harv. L. Rev. 276 (1948).

ganized group, then presumably the group too should be subject to some form of regulation. Control over organized groups may be effected in either of two ways. Legislation may be enacted to encourage the dissolution of the group by imposing criminal sanctions on persons who organize or join an outlawed society. While this technique may be expedient from the point of view of swift and certain results, when applied to organized social and political societies, it may operate with an indiscriminate and altogether dangerous severity. Corporate action and the propensity to combine is as fully characteristic of modern social and political behavior as of economic.[74] Although freedom of association is not expressly protected by the Constitution, the right of free speech and other basic civil rights would be seriously jeopardized if individuals were severely restricted in organizing and joining associations to promote their views.[75]

A second, and perhaps more feasible, method by which to effect control over organized societies would be to impose sanctions on members who themselves engage in criminal activity. The area of membership liability should be the same as that outlined by the rules set out in the Federal Criminal Code.[76] It would be a serious error, however, to attempt to effect this control by assigning criminality to any fictitious group entity. Persons tried for criminal acts committed through the medium of organized associations should be afforded the safeguards of the traditional criminal trial.

POST-KINSEY: VOLUNTARY SEX RELATIONS AS CRIMINAL OFFENSES

The recent publication of the Kinsey Report,[1] the first in a series of studies which will eventually include an entire volume devoted to legal aspects of sex behavior, presents a rare opportunity for re-examining a portion of the criminal law in the light of a factual study of the relevant social behavior. Professor Kinsey and his associates have made a taxonomic investigation of the external sex expression of some 5,300 representative white American males, and the authors' careful methods of sampling[2] permit, within limits pointed out by responsible critics,[3] extension of the findings to the whole sampled group.

[74] See Wyzanski, The Open Window and the Open Door, 35 Calif. L. Rev. 336 (1947).

[75] Bowe v. Sec'y of the Commonwealth, 320 Mass. 230, 69 N.E. 2d 115, 130 (1946). It would seem appropriate, therefore, to apply the clear-and-present-danger test to legislative restraints on organizing and joining. Shaw v. State, 76 Okla. Cr. 271, 134 P. 2d 999 (1943). In curbing the exercise of constitutionally protected rights, legislation must not be so broad as to comprehend conduct which in all other respects is wholly lawful; see Thornhill v. Alabama, 310 U.S. 88 (1940).

[76] See note 17 supra.

[1] Kinsey, Pomeroy, and Martin, Sexual Behavior in the Human Male (1948).

[2] Ibid., at 82–109.

[3] Goldstein and Pastore, 26 J. of Psychology 347 (1948); Riley, Some Observations on the Sampling Methods Used in the Report, in Problems of Sexual Behavior 37 (1948). For good

Objections to the Report's failure to investigate psychological data[4] which would explain motivations for sex expression do not indicate an omission which detracts from the work's usefulness here, because the laws to be scrutinized deal only with external manifestations of individual behavior without inquiring into their psychological causes.[5]

Notwithstanding the arousal of new popular interest in the status of our sex law by the wide lay circulation of the Report and its sensational allegation that 95 per cent of all males engage in sexual activities punishable as crimes, there has not been extensive comment from the legal profession.[6] This apathy may reflect an attitude that Kinsey merely underscores the obvious, or a feeling that while the need for a reevaluation of some of the premises underlying sex law may be granted, any attempt to change the status quo would be doomed to failure. Lay skeptics, however, may interpret silence as a tacit admission of Kinsey's serious charges that lawyers and judges seek to impose their own class standards of sex behavior upon the rest of the community.[7] Popular discontent with the "arbitrary and backward nature" of a substantial segment of the criminal law, perhaps now strengthened by the Report, may foster the spreading of an attitude of disrespect for other laws felt to be equally arbitrary and thus create grave enforcement problems.

The concept of "sex crime" popularly conveys the idea of reprehensible acts such as forcible rape or attacks upon small children. Few persons realize the extent to which voluntary private sex relations between adults are also beyond the law. While private voluntary sex acts, except for sodomy[8] and indecent ex-

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overall reviews of the Report not specifically concerned with sampling methods, see 31 Sat. Rev. of Lit. 17 (March 13, 1948); Gorer, 17 Am. Scholar 280 (1948); Trilling, 15 Partisan Rev. 460 (1948).

[4] Benedict, 31 Sat. Rev. of Lit. 34 (March 13, 1948); Eisenbud, A Psychiatrist Looks at the Report, in Problems of Sexual Behavior 58 (1948); Mead, An Anthropologist Looks at the Report, ibid., at 20.

[5] Sex laws and the Kinsey Report are alike in that they both fail to take into account the motivating forces which find overt expression in the illicit sex act. Sex laws, of course, have been criticized along with many other criminal laws for failing to differentiate between various causal inducements to commit an offense, distinctions which are important in determining the best means towards reformation of the offender. Glueck, Sex Crimes and the Law, 45 Nation 318 (1937). Fortunately the question of mens rea, which might also necessitate an inquiry into the omitted data, is of almost no importance in sex offenses where regularly the act without more is punishable.

[6] But see review comments by Burling, 23 N.Y.U.L.Q. Rev. 540 (1948); Ernst, 31 Sat. Rev. of Lit. 19 (March 13, 1948); Holcomb, 38 J. Crim. L. 687 (1948); Letourneau, 26 Can. Bar Rev. 746 (1948); Schwartz, 96 U. of Pa. L. Rev. 914 (1948). See also Harper, Legal Considerations in Relation to the Report, in Problems of Sexual Behavior 47 (1948); Llewllyn, The Limits of Sexual Law, in About the Kinsey Report 113 (ed. Geddes and Currie 1948); Ploskowe, Sexual Patterns and the Law, in Sex Habits of American Men 125 (ed. Deutsch 1948); Ernst and Loth, American Sexual Behavior and the Kinsey Report 124–41 (1948).

[7] Kinsey, op. cit. supra note 1, at 389–93.

[8] At common law sodomy, confined to acts per anum or with beasts, was punishable as a capital felony. 4 Bl. Comm. *215.

posure,[9] were not punishable under the common law of England, they were subject to the jurisdiction of the ecclesiastical courts.[10] The early American colonists, insisting on strict enforcement of the Puritan version of scriptural law and therefore not satisfied with the sparse sanctions of the common law, enacted special statutes punishing virtually all nonmarital sex activity.[11] Their descendants sought to enact similar laws in the territories and states successively settled by them, but different local conditions and the time lag between successive enactments made for little uniformity in the provisions of these statutes.[12]

This note will appraise the status and administration of those statutes which are applicable to voluntary sex acts between adults in the light of the Kinsey statistics. These acts, numerically the most significant, occupy a unique position in American jurisprudence.

I

It is necessary at the outset to establish the states and population percentages covered by different classes of sex laws, and to ascertain that portion of the white male adult population which would be subject to prosecution under these laws at any given time. The offenses selected for consideration are coextensive with the category "other sex offenses" as defined by state and federal criminal statistics. This group includes adultery, fornication, incest,[13] indecent exposure,[14] lewdness, seduction,[15] and sodomy, but excludes rape, commercialized vice, and offenses against family and children, which form separate statistical groups. As this study has been further restricted to voluntary private sex acts between adults which occur often enough to be statistically relevant, incest, indecent exposure, and seduction have also been excluded, thus leaving only adultery,[16] fornication, lewdness and sodomy[17] laws for the tabulation below.[18]

[9] Rex v. Crunden, 2 Camp. 89 (1809), citing Rex v. Sedley, 1 Keb. 620, 2 Sid. 168 (1664).

[10] But the ecclesiastical courts lost their powers in the 17th century. 4 Bl. Comm.* 64; May, Social Control of Sex Expression 200 (1936). Occasionally, penalties for fornication were imposed by the manorial hall-moots. 2 Pollock and Maitland, History of English Law 543 (2d ed. 1899).

[11] May, op. cit. supra note 9, at 232–56.

[12] An example of this development is indicated by Ohlson, Adultery: A Review, 17 B.U.L. Rev. 328, 532 (1937).

[13] Kinsey furnishes no data on incest but regards its incidence as very low. Kinsey, op. cit. supra note 1, at 558.

[14] Indecent exposure, a misdemeanor in nearly all states, is not a relation but is usually defined as an exhibition in public of nudity or a sex organ by an individual.

[15] Seduction presupposes deceit on the part of the seducer (usually in the nature of a fradulently given promise to marry) and hence cannot be classified as "voluntary." Del., Fla., Kan., La., Me., Nev., Tenn., Utah, Vt., and W. Va. do not make seduction a crime in addition to allowing redress in a civil action.

[16] The jurisdictions disagree as to who may be punished as an adulterer. Some hold that the offense can only be committed by a married person, while others hold both parties where one of them is married, and still others, following the Roman law, require one of the participants to be a married woman. See 2 Wharton, Criminal Law §§ 2079–84 (12th ed. 1932).

Some of the factual prerequisites required to invoke a given statute are listed under "qualifications" in the table. The distinctions, however, have not been drawn too finely. For example, the phrase "open and notorious," which is subject to different interpretations, has been construed not to require publicity;

[17] Sodomy, which in most statutes is not specifically defined and thus embraces the common-law definition, has elsewhere been enlarged to include passive and active mouth-genital activities and attacks on dead bodies, and, in Indiana, even covers a person who "entices, allures, instigates or aids any person under the age of twenty-one to commit masturbation. . . ." 4 Ind. Stat. Ann. (Burns, 1933) § 4221.

[18] Citations to statutes are in the order adultery, fornication, lewdness, and sodomy. Absence of statutory provisions covering a given offense will be indicated by a dash in the appropriate place. Ala. Code Ann. (Michie, 1941) tit. 14, § 16; ibid.; —; § 106 (no change in title unless indicated). Ariz. Code Ann. (1939) § 43-401; §43-402; —; §§ 43-406, 407. Ark. Stat. (Pope's Digest, 1937) § 3287; ibid.; —; § 3428-9. Cal. Pen. Code (Deering, 1941) § 269a, b; —; —; § 286-7. Conn. Gen. Stat. (1930) § 6223; § 6231; —; § 6222. Colo. Stat. Ann. (Michie, 1935) c. 48, § 203; ibid.; —; § 64. Del. Rev. Code (1935) § 5258; —; —; § 5256. D. C. Code (1940) tit. 22, § 301; § 1001; —; (Supp. 1949) tit. 22 (sodomy). Fla. Stat. (1941) § 798. 01; § 798.03; 798.02; § 800.01-02. Ga. Code (1933) § 26-5801; ibid.; § 26-6101; § 26-5901-4. Idaho Laws Ann. (Anderson, 1932) § 17-1806; § 17-1808 (imposition expressly within discretion of the court); § 17-1809; § 17-1812-3. Ill. Rev. Stat. (1947) c. 38, § 46-7; ibid. (and see below); —; § 141. 4 Ind. Stat. Ann. (Burns, 1933) § 10-4207; ibid.; —; § 10-4201. 2 Iowa Code (1946) § 702.1; —; § 725.1; §§ 705.1, .2; Kan. Gen. Stat. (Corrick, 1935) § 21-908; —; ibid.; § 21-907. Ky. Rev. Stat. (1948) § 436.070; ibid.; —; § 436.050. La. Code Crim. Law and Procedure (Dart, 1943) —; —; —; § 740.89. 2 Me. Rev. Stat. (1944) c. 121, § 1; § 8; § 5; §3. 1 Md. Ann. Code (Flack, 1939) art. 27, § 5; —; —; § 577.9. Mass. Ann. Laws (1933) c. 272, § 14; § 18; § 16; § 34. 24 Mich. Stat. Ann. (Henderson, 1938) § 28.218-21; —(see below); §28.567; § 28.355. 2 Minn. Stat. (1945) § 617.15; § 617.16; —; § 617.14. 2 Miss. Code Ann. (1942) § 1998; ibid.; —; § 2413. Mo. Rev. Stat. (1939) § 4653; ibid.; ibid.; § 4650. 5 Mont. Rev. Codes Ann. (Anderson & McFarland, 1935) § 11006; ibid.; —; § 11030. Neb. Rev. Stat. (1948) § 28-902; § 28-928-9; —; § 28-919. 5 Nev. Comp. Laws (Hilyer, 1929) § 10142; ibid.; ibid.; § 10141. 2 N.H. Rev. Laws (1942) c. 449, § 1; § 4; § 3; § 9. 1 N.J. Rev. Stat. (1937) tit. 2, c. 106, § 1; c. 133, § 1; c. 140, § 1; c. 168, § 1. 3 N.M. Stat. Ann. (1941) § 41-702; ibid.; ibid.; § 41-704. N.Y. Penal Law (McKinney, 1944) c. 8, § 100-2; —; —; c. 66, § 690. 1 N.C. Gen. Stat. (Michie, 1943) § 14-184; ibid.; —; § 14-177. N.D. Rev. Code (1943) § 12-2209-11; § 2208; § 2212; § 2207. Ohio Code Ann. (Throckmorton, 1948) § 13024; ibid.; —; §;13043. Okla. Stat. (1941) tit. 21, § 871-2; —; —; § 886. 3 Ore. Comp. Laws Ann. (1940) § 23-901-2; § 23-903; —; § 23-910. Pa. Stat. Ann. (Purdon, 1945) tit. 18, § 4505; § 4506; § 4519; § 4501. R.I. Gen. Laws (1938) c. 610, § 2; § 2; —; § 12. 1 S.C. Code of Laws (1942) § 1436; § 1437; —; § 1439. 1 S.D. Code (1939) § 13.3001-2; —; —; § 13.1716. Tenn. Code Ann. (Michie, 1938) —; —; —; § 11184. Tex. Ann. Pen. Code (Vernon, 1948) art. 499-501; art. 503-4; —; art. 524. Utah Rev. Stat. Ann. (1933) § 103-51-3 (one section); § 103-51-5; —; § 103-51-22. Vt. Pub. Laws (1933) § 8600-2; —; § 8611; —(see below). Va. Code Ann. (Michie, 1942) § 4543; ibid.; § 4545; § 4551. Wash. Rev. Stat. Ann. (Remington, Supp. 1940) § 2457; —; § 2458; § 2456. W. Va. Code Ann. (Michie, 1943) § 6058; ibid.; § 6059; § 6068. 2 Wis. Stat. (Brossard, 1947) § 351.01; § 351.05; § 351.04; § 351.40. 1 Wyo. Comp. Stat. (1945) § 9-503; ibid.; —; § 9-520. U.S. (applicable to territories and possessions), 18 U.S.C.A. § 516; § 518; —; — (1948).

The tabulation includes disorderly conduct statutes of Michigan and Illinois because they could be applied, unlike the states' other sex laws, to persons engaging in a single act of intercourse. Ill Rev. Stat. (1947) c. 38, § 159; 24 Mich. Stat. Ann. (Reis, Supp. 1937) § 28.364. In the absence of statutory provision sodomy is punished as at common law. All southern and many northern states have statutes prescribing severe penalties for miscegenation, but the constitutionality of such statutes is in doubt since a recent California decision, Perez v. Lippold, 32 Cal. 2d 711, 198 P. 2d 17 (1948); Constitutionality of Anti-Miscegenation Statutes, 58 Yale L. J. 472, table at 480-81 (1949). These statutes have here been excluded because they are applied mainly to negro males, who are beyond the scope of this study.

this in turn makes possible inclusion of those statutes in a study of private sex conduct. Also omitted from consideration are varied procedural requirements restricting instigation of suit, admission of evidence, and the time during which an action may be brought, as well as occasional narrow interpretations by appellate judges.[19] Since data on average imposed penalties are not available,

TABLE 1

SCOPE OF SEX STATUTES

Offense	Qualification	No. of States Where Applicable*	Per Cent of Total White Male Population	Maximum Punishments (Where Defined)	
				Median	Range
Adultery....	Single act	29	57.2	2 yrs. pen. and/or $1,000	$10—5 yrs. pen. and $1,000
	Habitual	12	30.0	6 mos. and/or $500	$100—2 yrs. pen.
	Open, notorious, and habitual	6	9.5	6 mos.	$80—2 yrs. pen.
	No crime	2	3.3	.....	.....
Fornication..	Single act (or punishable as disorderly conduct)†	20	43.8	3 mos. and/or $100	$10—6 mos. and/or $300
	Habitual	11	22.1	6 mos.	$100—1 yr. and/or $500
	Open, notorious, and habitual	6	15.3	1 yr. and/or $1,000	$80—3 yrs. pen.
	No crime	12	28.8	.....	.....
Lewdness....	Open and notorious	7	15.5	1 yr. and/or $500	6 mos. and/or $200—5 yrs. pen.
	Lewd and lascivious behaviour	2	4.4	.....	1 yr. and/or $300—1 yr. chain gang
	Lewd and lascivious behaviour, open or not, depending on marital status	9	18.5	1 yr. and/or $500	$500—5 yrs. pen.
	No statutory crime	31	61.6	.....	.....
Sodomy.....	With mankind or beast, etc. (usual definitions)	45	96.3	10 yrs. pen.	3 yrs. pen.—life
	Inciting to masturbation included	2	3.0	.....	5 yrs. pen.—14 yrs. pen.

* Includes the District of Columbia.

† "Disorderly conduct" in Illinois and Michigan; cf. note 18 supra.

ranges[20] and medians[21] of maximum penalties are included to indicate their distribution; but these are of little practical significace as regards the first three offense groups because, as to them, maximum sanctions are rarely invoked. Indeed, the diversity in punishment may be much less drastic in practice than the ranges would seem to indicate.

[19] See Williams v. State, 64 Ind. 553 (1878), a case under a lewdness statute which prohibited indecent exposure in a public place. The defendants were having intercourse on a highway, to the amusement of sundry bystanders. Held that, in the absence of convincing proof that it was being habitually travelled upon at the time and place of the act, the highway was not a "public place" within the meaning of the statute.

[20] Range: The difference between the least and greatest value in a series; also the extent of the series.

[21] Median: A point so chosen in a series that half of the individuals in the series are on one side of it, and half on the other. Webster's Collegiate Dictionary 621 (Merriam's 5th ed. 1946).

With the aid of the Kinsey Report's figures it is possible to determine the percentage of white males whose acts would subject them to prosecution under the above sex statutes. Kinsey claims that:

> ... 85 per cent of the total male population has premarital intercourse ..., 59 per cent has some experience in mouth-genital contacts ..., nearly 70 per cent has relations with prostitutes ..., something between 30 and 45 per cent has extra-marital intercourse ..., 37 per cent has some homosexual experience ..., 17 per cent of the farm boys have animal intercourse.... All of these ... are illicit activities, each of which is punishable as a crime under the law. The persons involved in these activities, taken as a whole, constitute more than 95 per cent of the total male population ... for which the judge, or ... church, or civic group demands apprehension, arrest, and conviction, when they call for a clean-up of sex offenders in a community. It is, in fine, a proposal that 5 per cent of the population should support the other 95 per cent in penal institutions.[22]

As formulated, the last statement is untenable. It rests upon the false assumptions that 1) all states outlaw all of the indicated behavior (an error already corrected in Table 1, supra.), and 2) that, if the act were committed at any time during the offender's life, he would thereafter permanently remain criminally liable. As most statutes bar prosecution on a sex charge upon the lapse of a relatively short time after the offense,[23] the number of persons who have ever been criminally liable is irrelevant from the point of view of law enforcement at any given time. That portion of the population which is actively engaging in an illicit sex act during a given short period (active incidence) is substantially lower than the portion who have ever done, or will ever do, such an act during their lives, or by the time they reach a given age (accumulative incidence). Thus the sex acts which an adult of thirty may have committed during his life might greatly outnumber the acts which he is currently committing as well as those for which he is still subject to prosecution where the statute of limitations has not run. But because Kinsey is more interested in the behavior pattern of a homogeneous age group[24] than in that of a heterogeneous age group at a given time, many of his statistics are only presented as accumulative incidences. For the purpose of this study it has been necessary, in order to determine temporary sex criminality, to choose a reasonable proportion of accumulative incidence as active incidence.[25]

[22] Kinsey, op. cit. supra note 1, at 392.

[23] For example, Mich., Minn., N.D., Ore., and Wash. require that prosecutions for adultery be initiated within one year after the offense. California has a one year statute of limitations applicable to all misdemeanors, while such states as Illinois and New York allow two years. The foregoing does not purport to be an exhaustive listing, and of course does not apply to offenses classified as felonies (such as sodomy and some forms of lewdness) for which the statute may allow a much longer period.

[24] E.g., all males 20–24 years of age, a grouping which is more significant for clinical purposes.

[25] Kinsey is admittedly inconsistent in his use of accumulative incidence techniques: cf. Kinsey, op. cit. supra note 1, at 114–19. But compare table 94, ibid., at 370. In using this table

Implicit in the definition of certain offenses is the requirement of a minimum rate of repeated commission of an act. To determine the number punishable for such an offense it becomes necessary to ascertain those who at a given time are engaging in the conduct sufficiently often. For example, the provisions of a statute outlawing association in a "state of adultery" may include persons whose extramarital intercourse occurs only a few scattered times per year.[26] Unlike statistical *means*, averages which are greatly thrown off by extreme high or low frequencies, *medians* or other graphs indicating the distribution of frequencies can be used for a rough estimate of that segment of the population whose rate of performing the act exceeds the required minimum.[27] As the frequency rates of the general population were needed to establish the offense coverage of the statutes, and since the Report neglected medians or other distribution graphs for the United States population but furnished medians for the frequencies of the sample population, the approximations for group frequencies used below were derived from those given for the sample. Appropriate adjustments discussed in the notes,[28] were made in projecting Kinsey's sample figures to the population as a whole.

Although the restriction of this inquiry to voluntary private sex acts results in the exclusion of certain sex offenses included by Kinsey to achieve his totals, little error even for comparative purposes is introduced in the figures below. Any person who is engaging in one illegal sex act during the period will be deemed "subject to prosecution"; hence only persons who engage exclusively in one of the omitted sex activities would not be represented in the totals. Prostitution can thus be omitted because of the very small number of men who rely on it alone for their intercourse outlet, and also because the relevant statutes are directed primarily against the prostitute and her business associates, and only incidentally, if at all, against the male "customer."[29] Because active inci-

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in the absence of more precise data, one-half the accumulative incidence was here arbitrarily selected as the active incidence; a percentage which, particularly as to oral eroticism, errs on the side of bigness.

[26] Where "living together" or "cohabitation" in such a state is required in addition, even daily repeated intercourse may be insufficient to establish the offense in the absence of a showing that the parties lived under the same roof. This additional qualification has been omitted in the calculations for Table 2, infra, because of the caprice of judicial interpretation, but as a result the percentages there are overstated.

[27] Medians are inferior to other distribution graphs because they give no clue as to the change of the frequency rate on either side of the midpoint.

[28] The difficulties in deriving the number of persons engaging in a given act at a required minimum rate are illustrated in the use of Table 54, Kinsey, op. cit. supra note 1, at 248. The median frequencies for extra-marital intercourse among the *total sample* population (column 4) are there listed as 0.00 acts per week, but the average median for the *active sample* population (column 8) is high enough to qualify one-half of the actives as offenders. Since no median is furnished for the U.S. corrected figures, (columns 10–15) but active incidences are given, one-half of the U.S. corrected active incidence (column 13) was the percentage chosen as "subject to prosecution."

[29] Of the 35.3 per cent of the population not subject to prosecution for other single acts of non-marital intercourse, only .2 per cent are so punishable for visiting a house of prostitution.

dence for animal intercourse is very low even among farm boys and insignificant as applied to the total population, the figures have been excluded.[30] Statutory rape, a relatively frequent subject of prosecution for which no incidence figures have been given, probably constitutes only an extremely small source of exclusive illegal sex outlet except for young people of approximately the same age. The boy's youth may then place him within the jurisdiction of a juvenile court and thus exempt him from the statutory sanctions.[31]

The widespread existence of juvenile courts is also responsible for fixing the lower age limit of this survey to sixteen. Although this excludes offenders younger than sixteen who must undergo some form of punishment, it will include older offenders who may often escape any real punishment because of the concurrent misdemeanor jurisdiction of a juvenile court over persons to 18 or even 21 years of age. Limitations in Kinsey's present data for older groups necessitated fixing of the upper age limit at sixty.[32]

While the percentages shown in Table 2 are less sensational than the 95

TABLE 2

PERCENTAGE OF POPULATION SUBJECT TO PROSECUTION FOR VOLUNTARY SEX ACTS

	Single White Males		Married White Males		Total White Males		
	Single Acts	Habitual Acts	Single Acts	Habitual Acts	Single Acts	Habitual Acts	Total Acts
Percentage of total white male population.....	14.5	1.9	12.1	1.8	26.6	3.7	30.3
Percentage of white male population ages 16–60.	25.9		22.0		42.1	5.8	47.9

American Social Hygiene Association, Digest of Laws Dealing with Prostitution and Other Sex Offenses (1942). But in many states "customers" may fall within vagrancy statutes not included in the above compilation, and the federal Mann Act as well as similar state enactments have not been applied exclusively to white slave traffic but have snared mere unwary fornicators. Compare note 67 infra.

[30] For the total population, only a fraction of one percent of the total number of orgasms is derived from animal intercourse. Kinsey, op. cit. supra note 1, at 670; ibid., figures 128–30, at 490–91.

[31] See Lyman, Analysis and Tabular Summary of State Laws Relating to Jurisdiction in Children's Cases [etc.] in the United States (1930).

[32] The Kinsey percentage cited in the text presumably includes all age groups. Restriction of this study to ages 16–60, however, still permits a valid comparison of the two sets of data. As pointed out in the text, the fixing of the lower age limit virtually accounts for all punishable youthful offenders. The sample for age groups above forty-five is much smaller than the 300 which Kinsey considers most adequate; see Kinsey, op. cit. supra note 1, at 85–88, also generally ibid., c. 7. Where better data were not available, ages 45–60 have been carried at the higher rates of age 45. The resulting overstatement is probably large enough to account for the virile males over sixty which are represented in the Kinsey figures.

per cent estimated by Kinsey, they do show that under our present sex statutes a substantial portion of the population, particularly of the income-earning group of which men between sixteen and sixty are by far the largest component,[33] is engaging in illicit sex conduct at any given time.

II

The preventive effect of a sex statute, operative in a domain where other social forces exercise a strong deterrence, cannot be gauged directly. But it is immediately affected by the degree of enforcement which is a measurable quantitative correlation between offense and conviction. Because of statistical limitations only the less valuable comparison between the number of arrests and that of offenders can here be established. Even then a difficulty arises out of the present lack of diversity of Kinsey's overall sample which is mainly taken from a limited geographic area.[34] Because the geographic variation in sex behavior is indicated as substantial,[35] the analysis of enforcement here attempted is confirmed to two regions: the East North Central States (ENC), comprising Illinois, Indiana, Michigan, Ohio, and Wisconsin; and the Middle Atlantic States (MA), including New Jersey, New York, and Pennsylvania. Because the criminal statistics compiled by the Federal Bureau of Investigation[36] and relied on here do not list rural data for "Class 2" crimes which include "other sex offenses," a further restriction to urban white males only is required in this study.

The years 1938–1947, which include the later war years when millions of men were beyond the reach of state criminal statutes, present a convenient period for investigation. The number of offenders is taken from F.B.I. tables showing the number of persons "charged" (held for prosecution).[37] The table which lists the age of offenders segregates age "50 and over" in one group. Error is thus introduced by the possible inclusion of offenders over sixty, but according to population statistics their number is too small to affect the application of the enforcement data to the Kinsey data, which sets the upper age limit at sixty. Since age breakdowns by sex and race are not given, it has been assumed that they are the same for males and females as well as for the white and nonwhite population. Finally, the Uniform Crime Reports give relevant data only for a substantial portion of the total urban[38] population. The statistics for

[33] 69.4 per cent. Calculations from Sixteenth Census, Part 1, Vol. III, table 5, at 19 (1940).

[34] Kinsey, op. cit. supra note 1, fig. 1, at 5. The distribution there shown is inaccurate because it includes female histories also.

[35] See 15 Fortune 188 (April 1937) (geographical variation in attitudes on premarital intercourse).

[36] Uniform Crime Reports (compiled semi-annually).

[37] See, typically, 19 Unif. Crime Rep. 54, table 18 (1948). Together with the number of persons released without being charged, the number of persons held for prosecution indicates the total arrest activity by the police.

[38] "Urban" here does not connote "metropolitan"; more than half of the "cities" reported have less than 10,000 inhabitants. Ibid., at 5.

"persons charged" have therefore been corrected for urban coverage, race, sex, and age.[39] Table 4 indicates the number of urban white males, ages 16–60, who could be prosecuted for sex offenses in the two regions.[40] For the two regions combined, which contain 60.3 per cent of the total urban white male population of the United States, out of 4,151,800 offenders subject to prose-

TABLE 3

AVERAGE NUMBER OF SEX OFFENDERS 1938–47

YEAR	URBAN POPULATION COVERED BY CRIMINAL STATISTICS (IN THOUSANDS)		NUMBER OF OFFENDERS ("PERSONS CHARGED")	
	MA*	ENC†	MA	ENC
1938	7,651	13,186	1,250	2,615
1939	7,914	13,824	1,168	2,966
1940	8,098	13,822	1,203	3,020
1941	7,637	13,443	1,418	3,189
1942	7,631	7,527	1,130	2,000
1943	8,768	13,951	1,557	4,267
1944	9,412	14,441	1,604	4,135
1945	9,672	14,832	1,781	4,179
1946	9,472	14,749	1,996	5,314
1947	9,813	15,126	2,218	5,174
Average	8,607	13,490	1,533	3,686
Average no. of offenders, as corrected			2,270	2,912
Average corrected no. of offenders, MA and ENC				5,182

* Middle Atlantic states.
† East North Central states.

cution (Table 4) only 5,182, or .12 per cent, actually have been charged (Table 3), leaving 99.88 per cent not charged. For the Middle Atlantic States region only, the Judicial Criminal Statistics provide fairly reliable data on the average percentage of convictions. Of 2,275 persons charged, 70.5 per cent have been convicted. However, out of 2,588,900 persons subject to prosecution, only .06 per cent have been charged and convicted.[41]

[39] For the East North Central States, the calculations were: 3,686 (average number of offenders "charged") times 1.29 (correction factor for total urban population) times .783 (combined correction factor for per cent of males and age) times .781 (correction factor for per cent of whites).

[40] The Line 1 figures are obtained for the regions in the same manner as Table 2 was compiled for the entire country.

[41] Even these figures are swollen as regards the statistically most common act of nonmarital heterosexual intercourse. A positive correlation probably exists between the notoriety of the offense and the number of arrests made, so that most persons charged with "other sex offenses" may be homosexuals or other sodomists and exhibitionists.

This law enforcement failure may be traced to the difficulties inherent in the enforcement process itself, and to a substantial difference between the mores of current society and those of the framers of the statutes. Limited police personnel, constitutional and procedural safeguards, politics, and difficulties inherent in detection hamper enforcement of almost any criminal statute.[42] Although the apparent contrast between current mores and positive law may seem peculiar,[43] it must be remembered that these statutes were enacted originally to apply to an ethnically homogeneous population whose mores were not too far

TABLE 4

PERSONS "SUBJECT TO PROSECUTION" FOR THE COMMISSION OF "OTHER SEX OFFENSES"

Line		MA	ENC
1.....	Percentage of total white male population punishable for any sex offense (ages 16–60)	26.4	19.4
2.....	Percentage of total white male population in these states who are "urban" residents	75.2	63.0
3.....	Percentage of total white male population punishable for any sex offense (urban, ages 16–60; line 1 *times* line 2)	19.9	12.2
4.....	Total white male population (in thousands)	13,084	12,893
5.....	Urban white males ages 16–60 subject to prosecution (line 3 *times* line 4)	2,588,900	1,562,900

removed from those of their self-righteous Puritan leaders.[44] The statutes are periodically re-enacted and penalities are altered to conform to current practice, but these are routine legislative matters over which the public at large exercises little control.

The mere fact that a person does not initiate the prosecution of a particular sex offender neither indicates that person's approval of the conduct nor his desire to eliminate the law.[45] But since this condonation may well be the crux of the enforcement problem, it seems worthwhile to inquire into possible motives for the initiation of prosecution,[46] apart from a mere general moral disap-

[42] These ordinary enforcement difficulties hamper the clearance by the police of even serious crimes, and account for the fact that in 1947 approximately 20 per cent of major crimes against the person and 75 per cent of major crimes against property were admittedly not cleared by arrests. Kinsey, op. cit. supra note 31, at 48.

[43] Theoretically, the majority in a democracy would be able to repeal laws which do not mirror its mores. In practice, it is well known that organized minority groups bring greater weight to bear on a legislature than does an apathetic and heterogeneous majority. Fuller, Morals and the Criminal Law, 32 J. Crim. Law 624 (1942).

[44] May, Social Control of Sex Expression 259 (1936).

[45] No logic compels to an inference that A approves of an act X outlawed under a statute S when done by B, merely because A does not want to have B prosecuted. A may dislike X but dislike S more, or merely dislike S when applied to B.

[46] Dean Pound considers the necessity of providing motives for the initiation of prosecution one of the three major limitations of law as an agency of social control. The others are "the

proval. Motivation may depend on the extent to which a given act affects the marital relation. Thus a spouse may seek criminal law redress for the unfaithfulness of the other. It is significant to note, however, that although thousands of divorces are granted annually, and although adultery is one of the major grounds for divorce because it is one of the few such grounds recognized by nearly all states, the number of prosecuted adulterers is negligible, even though the facts constituting the crime are here directly before a court.[47] Civil actions for criminal conversation, now eliminated in many states,[48] rarely if ever result in the criminal prosecution of the defendant under the applicable adultery statutes. Wigmore does not list a single case of intra-marital sodomy in his exhaustive enumeration of the exceptions to a defendant's privilege against the admission of testimony of a spouse, although this is clearly a crime otherwise falling within the exceptions.[49] The scandal involved in the initiation of prosecution and the virtual impossibility of convincing the jury on the testimony of a participant to the act deters the most hardy.

The only motive of any practical significance in seeking prosecution of private nonmarital (as distinguished from extramarital)[50] sex acts would seem to be spite which may arise from a transaction unrelated to the act itself. But the prosecuting witness may subject himself to the penalties he seeks to have applied to the defendant, and if the witness is a female, as is the rule, her reputation would be marred by notice of her participation. While an offense like nonmarital sodomy might itself impel initiation of prosecution because of a genuinely outraged sense of decency, outsiders do not get a chance to observe another's sex conduct except accidentally or unless purposely violating the privacy sought by the participants.

In the absence of a statistical determination of the maximum extent to which the normal administrative difficulties influence enforcement, it cannot be demonstrated that the divergence between law and mores is in itself sufficient to account for the breakdown.[51] But it seems reasonable to conclude that this gap is a prime causal factor.

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necessity which the law is under . . . of dealing only with the outside . . . of men and things," and "the limitations inherent in the legal sanctions. . . ." Pound, The Task of Law 72 (1944).

[47] "In New York state something like 5,000 divorces are granted annually. If the law were duly enforced we should expect in that state something like 10,000 convictions each year for adultery. As a matter of fact there are practically none. . . ." Butler, Sex and the Law, 90 Survey Graphic 242 (1936); see also 2 Simpson and Stone, Law and Society 1582 n. 2 (1949).

[48] See generally Feinsinger, Legislative Attack on "Heart Balm," 33 Mich. L. Rev. 979 (1935).

[49] The exceptions, based upon personal wrongs done to the wife, are listed in 8 Wigmore, Evidence § 2239 (3d ed. 1940).

[50] In Kinsey's terminology, "nonmarital" refers to the sex activities of the single male, "extra-marital" to the "extra-curricular" acts of the husband.

[51] The demonstration could be made by establishing a statistical "threshhold" as the minimum possible enforcement ratio due to the action of all ordinary deterrent factors. Anything lower than this percentage would necessarily indicate the causal sufficiency of the rift factor.

Although the vast majority of sex offenders are conclusively disposed of by police and magisterial courts,[52] these primary enforcement echelons are bound by the law as interpreted upon appellate judicial review. Appellate judges, unlike most policemen and magisterial officials whose appointments rarely depend on academic qualifications,[53] generally come from "upper" classes and have had the opportunity to acquire considerable formal education. Of forty-two appellate judges in twenty jurisdictions sitting in sex offense cases during the period investigated, thirty-nine belonged to Kinsey's "13-plus"[54] classification, and at least thirty had graduate college degrees.[55] If Kinsey's theory on the negative correlation between status and sex activity is correct,[56] and if a low rate of activity implies lack of toleration for the promiscuous rates and divergent practices of others, the mores of the judiciary should be reflected in decisions giving a broad scope to the sex laws under review which would then offset the enforcement apathy of the first-instance agencies.

The accuracy of the foregoing proposition cannot be proved because the number of sex cases appealed is too small, and the diversity of conduct passed upon too limited to permit comparison with offenses finally disposed of in the first instance. During the period 1938–47 only 116 appeals dealing with offenses herein considered were reported nationally.[57] Of these, 72, or 62 per cent, dealt with sodomy, presumably because the penalities for that crime are far more severe than those prescribed for the other offenses and thus render the large expense of an appeal worth while.

Appellate reversals, even where based on substantive grounds, do not necessarily indicate either the discharge of the defendant or the judge's social attitude.[58] Considerable leeway for the exercise of judicial discretion is presented by questions on the sufficiency of the evidence which account for 63 per cent of all reversals on substance during the period.[59]

[52] Included are municipal and other criminal courts of general primary jurisdiction.

[53] The diverse and non-legal background of magistrates is illustrated in Ervin, The Magistrates' Courts of Philadelphia 104 (1931).

[54] "13+" denotes persons having had one or more years of college training or an equivalent education. Kinsey, op. cit. supra note 1, at 77; ibid., c. 10.

[55] 73 judges handed down appellate sex opinions during the period, but the biographical records of only 42 were available, mainly from Who's Who in Law (1937).

[56] Kinsey claims the existence of a negative correlation between attained education and amount of nonmarital intercourse, and of a positive correlation between social level and variety of sex experience. Kinsey, op. cit. supra note 1, c. 10.

[57] Space limitation prevents citation of the cases, which were taken from the General Digest of the West System for this period, under the headings Adultery, Fornication, Lewdness, and Sodomy.

[58] A survey of the fact situations of the appealed cases to determine what fact groupings judges consider most relevant in reaching their decisions, thereby obtaining a clue to their prejudices, proved inconclusive, partly because there is a prudish hesitancy to fully describe the facts pertaining to sex offenses in an opinion.

[59] The isolation in which parties usually engage in voluntary sex relations, and the fact that many states prohibit convictions resting solely on the uncorroborated testimony of an "ac-

Only cases where at least one of the defendants is a male are listed in the tabulation of appellate dispositions in Table 5. The trend indicated by the very high percentage of reversals on nonsodomy appeals tends to contradict

TABLE 5

APPELLATE SEX DECISIONS 1938–47

	Total	Aff'd	Per Cent	Rev'd Subst.	Per Cent	Rev'd Proced.	Per Cent	Per Cent Total Rev'd
Fornication...	15	7	.....	5	33.3	3	20.0	53.3
Adultery.....	12	4	.....	7	58.3	1	8.3	66.6
Lewdness.....	17	7	.....	10	58.9	.....	.....	58.9
Subtotal....	44	18	41.0	22	50.0	4	9.0	59.0
Sodomy.....	72	57	79.2	12	16.7	3	4.1	20.8
Total....	116	75	64.7	34	29.3	7	6.0	35.3

Kinsey's assertions on the sexual intolerance of the judiciary and on an alleged correlation between class status and the condonation of private voluntary sex acts.[60]

III

The foregoing sections indicate that laws restricting private voluntary sex expression are rarely enforced. While widespread practice ordinarily is linked with an attitude of approval, some or all of these acts, as Kinsey also observed,[61] are still widely disapproved. This disapproval varies with the known

complice" prosecuting witness, force the trial courts to rely freely on circumstantial evidence of questionable probative value.

[60] "On sex cases, the decisions of the judge on the bench are often affected by the mores of the group from which he originated. Judges often come from better educated groups, and their *severe condemnation* of sex offenders is largely a defense of the code of their own social level. Lower level individuals simply do not understand the *bitter denunciations* which many a judge heaps upon the lower level boy or girl who has been involved in sexual relations." Or "[j]udges who are ignorant of the way in which the other three-quarters of the population lives [sic], naively believe that the police officials are apprehending all of those who are involved in any material infraction of the sex laws." Kinsey, op. cit. supra note 1, at 390–99 (italics added). Compare Fake, J.: "Assuming arguendo that the petitioner here is found to have fornicated within the meaning of the law . . . can this conclusion, in the realm of the law, be arrived at without carrying the blight of immorality with it? I think it can. The true character of a man is largely, if not entirely, hidden in the secret recesses of his mind. Only by his conduct and by his words are we able to obtain any evidence of it. Moreover, as we have seen the generally accepted rules of morality . . . fluctuate in each era and the best we can do with the subject is to apply the generally accepted rules of our own day." Pet. of Smith, 71 F. Supp. 968, 972 (D.C. N.J., 1947) (petition for naturalization). In a very recent New York case, the Appellate Division upheld an award of custody of her minor daughters to a woman divorced because of her belief in and practice of extra-marital sexual experimentation, but the Court of Appeals reversed, two judges dissenting. Bunim v. Bunim, 273 App. Div. 861, 77 N.Y.S. 2d 45 (1948), rev'd 83 N.E. 2d 848 (1949).

[61] Kinsey, op cit. supra note 1, at 384 (homosexuality), 584 (extra-marital intercourse).

or surmised frequency of a given act in the critic's own social and economic subgroup;[62] reasons for disapproval are, however, substantially the same for all the offenses here considered. The pressure of organized moral and religious groups,[63] social pressure for early marriage and legitimate children,[64] and the efforts of public agencies seeking to prevent the spread of venereal disease,[65] partly account for this disapproval. Assuming, arguendo, that for these or other reasons a majority of the population still publicly castigates nonmarital private voluntary sex relations, it may still be asked whether the criminal law is a suitable medium for the effective expression of this disapproval.

Some who answer affirmatively may feel that legal sanctions are essential to provide the desired deterrent and reformative effect. Since deterrent effect is directly proportional to the degree the law is known to be enforced, advocates of this point of view should logically press for more vigorous enforcement.

The difficulties inherent in this approach are strikingly illustrated by a wartime government campaign. After the passage of the Selective Service Act in 1940 the government became increasingly concerned over venereal disease as a factor in reducing available manpower. This concern led to the May Act[66] which provided that civilian activities abetting "lewdness, assignation, or prostitution" in the vicinity of army and navy camps would be punishable as a federal offense. While this act was ostensibly directed at professional prostitution, settled judicial misinterpretation of the Mann Act[67] opened the door to possible federal intervention in the enforcement of all state sex laws within the prescribed

[62] Ibid., at 384–86.

[63] The church, however, has not always practiced what it preaches. Thus "[t]he London citizens used to arrest fornicating chaplains and put them in the tun as night-walkers; in 1297 the bishop objected and the practice was forbidden. Munim. Guildh. ii. 213." 2 Pollock and Maitland, History of English Law 543 n. 5 (2d ed. 1899). See May, Social Control of Sex Expression, c. 6 (1936). An intelligent modern clerical viewpoint is presented by Gardiner, Moral and Ethical Considerations in Relation to the Report II, in Problems of Sexual Behavior 73 (1948).

[64] A reduction in the sexual pressure toward early marriage, by lifting criminal sanctions from nonmarital intercourse, might result in keeping young women in the labor market for a few additional years, a situation which, if it resulted in an excess supply of labor, might tend to depress wages. Query whether an increase in the birth rate is desirable or significant in the atomic age; a recent House of Lords decision does not consider the existence of a possibility of procreation as essential to "consummate" a marriage. Baxter v. Baxter, [1948] A.C. 274. Concerning the legal scope of this case, see Gower, Baxter v. Baxter in Perspective, 11 Modern L. Rev. 176 (1948). The financial problem raised by the state's duty to maintain, at public expense, illegitimate children who have no other means of support may be more serious.

[65] The later stages of syphilis may lead to insanity and force impecunious victims into already overcrowded state mental institutions. "Sanitary" practices of abortion mills have been the subject of widespread adverse comment.

[66] 55 Stat. 583 (1941), 18 U.S.C. § 1384 (1948).

[67] 18 U.S.C. §§ 2421–23 (1948); Cleveland v. United States, 329 U.S. 14 (1946); Caminetti v. United States, 242 U.S. 470 (1917); King v. United States, 55 F. 2d 1058 (C.C.A. 10th, 1932). Taylor, Manhandling the Mann Act, 5 Nat. Bar. J. 39 (1947); Rogers, The Mann Act and Non-Commercial Vice, 36 Law Notes 107 (1933).

areas.[68] It was soon recognized that professional prostitutes accounted for only a small minority of the infections, the majority of which were passed along by civilian "victory girls."[69] Although the May Act was invoked in only two vice campaigns, the surprisingly large number of convictions[70] leaves little doubt that its terms were "liberally" construed by the enforcing federal agents. At the same time heavy pressure was brought to bear on local agencies to enforce long dormant state sex laws. The Social Protection Division of the Office of Community War Services, a subsidiary of the Federal Security Agency, issued detailed "advisory" material for the use of local police,[71] and also attempted to co-ordinate the activities of federal and state agencies,[72] including the United States Public Health Service, which is normally concerned with venereal disease control. The resulting restrictions on business and freedom of movement after dark would hardly be tolerated in any community during peacetime, but venereal infections continued with but slight occasional abatement. Not until the services, which originally placed much reliance in a persuasive but ineffective espousal of continence, adopted a policy of virtually mandatory prophylaxis for those who had an opportunity for off-camp contacts, did the rate of venereal infection show a permanent decline, a fact which would indicate that the reduction in total nonmarital intercourse was probably negligible.

The social cost of effective enforcement might be far greater than the evils sought to be suppressed. Twenty years ago the entire administration of law was on the verge of disintegration over the attempted enforcement of prohibition legislation.[73] The search and seizure cases decided during that era[74] indicate

[68] Mr. J. Edgar Hoover, in a letter to the University of Chicago Law Review dated Feb. 2, 1949, insists that FBI agents assist in the apprehension of sex law violators only where some federal law has been violated, but that investigative assistance only is available to local law enforcement officials in the processing in the FBI laboratory of evidence relating to sex offenses.

[69] "Army and Navy reports show a great majority of infections traceable to 'free' girls, or 'pickups.'" Calling All Communities, American Social Hygiene Association, Publication No. A-575 (1945).

[70] In the two areas, Fort Bragg, N.C., and Camp Forrest, Tenn., FBI special agents secured the *conviction* of 784 "prostitutes and procurers" up to January 31, 1944. Pennington, The Challenge to Law Enforcement, 30 J. Soc. Hyg. 530, 535 (1944). This figure might not seem excessive because more than 30,000 persons were charged with prostitution and commercialized vice during 1943. 15 Unif. Crim Rep., table 14 at 35 (1944). However, Table 3 in the text indicates that during 1943–44, when about ten million active men were beyond the reach of state sex laws, there was no appreciable decline in the prosecution of sex offenders, from which it may be inferred that at least the threat of federal intervention kept state police active.

[71] See, for example, Techniques of Law Enforcement in the Use of Policewomen with Special Reference to Social Protection (1945); Techniques of Law Enforcement against Prostitution (1943).

[72] "The Social Protection Division aids communities in controlling venereal disease through law enforcement for repression of prostitution and *promiscuity*." Services of the Federal Security Agency 17 (1944) (italics added).

[73] See Enforcement of the Prohibition Laws [Wickersham Report], Sen. Doc. 307, 71st Cong. 3d Sess. (1931).

[74] See appendix to dissent by Frankfurter, J., in Harris v. United States, 331 U.S. 145, 175 (1947), for list of relevant Supreme Court decisions.

how attempts to impose minority morals may lead to an invasion of the civil liberties of the majority. But even under rigidly-enforced laws the continuation of sex activities would still be infinitely easier than was the manufacture and transportation of liquor, and such a policy might well lead to an increase in organized prostitution.

Those convinced of the impracticability of more rigorous enforcement may nevertheless wish to retain the statutes in their present state because of a belief that the law, as an integral part of the mores-forming social apparatus,[75] embodies the ideal morality toward which people are or should be striving.[76] Some laws are not intended to be enforced but simply represent an expression of public policy, it is said. Proponents of this view point to the analogy of laws against discrimination advocated in the face of contrary popular attitudes, or they may assert that the state should possess a ready tool for the early segregation of dangerous "real" sex criminals. Convinced of the impossibility of satisfactory amendment or repeal, they may even point to the enforcement figures to argue that these laws will slowly fall into desuetude and thus approach the limit of complete annulment.[77]

But the maintenance of a law not sought to be enforced adds an impetus to the perpetration of blackmail,[78] and may lead to popular disrepect for all law. An unenforced statute will contribute little to the formation of popular mores, and the discrimination analogy is fallacious because it ignores that such statutes seek to undo the effect of environment, not instinct. The theory that these laws are convenient tools for the preventive arrest of potential sex slayers is based on the erroneous assumption that a desire for nonmarital intercourse implies sadism, and, besides affording no guaranty against prosecution of harm-

[75] Hall, Prolegomena to a Science of Criminal Law, 89 U. of Pa. L. Rev. 549 (1941).

[76] "The test of a criminal law is not its correlation with actual behavior, but its correspondence to behavior ideals and its efficiency in promoting those ideals." Schwartz, Review of the Kinsey Report, 96 U. of Pa. L. Rev. 914, 915 (1948); see also Mead, An Anthropologist Looks at the Report, in Problems of Sexual Behavior 58 (1948). The conflict between attitude ideals and practical necessities, according to one view, results in the establishment of *sub rosa* institutions: Arnold, The Folklore of Capitalism 207–9 (1937) (referring to anti-vice and anti-trust laws). Surprisingly, even psychoanalysts can see a justification for the laws. "Culture has to call up every possible reinforcement in order to erect barriers against the aggressive instincts of men and hold their manifestations in check by reaction-formations in men's minds. Hence . . . the restriction on sexual life. . . ." Freud, Civilization and its Discontents, 86–87 (1930). For an excellent recent analysis of the function of the criminal law as a purgative for the social aggressions of the unpunished population, see Reiwald, Die Gesellschaft und Ihre Verbrecher (Zürich, 1948).

[77] An analogy to the enforcement of American "blue laws" might be suggested, but 15,000 "other sex offense" prosecutions a year belie the notion of desuetude at least for the victims. Professor Harper, however, considers legislation by desuetude the only immediately practicable method for limiting the effects of sex "book law." Op. cit. supra note 6.

[78] How the threat of prosecution was sought to be turned into large amounts of cash by public law-enforcement officials is shown in Attorney General v. Pelletier, 240 Mass. 264, 327–30, 134 N.E. 407, 427–29 (1922) ($50,000 sought for stay of prosecution for adultery and lewd and lascivious cohabitation); Attorney General v. Tufts, 239 Mass. 458, 501–7, 511–16, 132 N.E. 322, 331–34,336–38 (1921) ($100,000 paid for stay of prosecution of movie magnates for visiting house of ill fame).

less persons, indicates an unsophisticated approach to the serious problem of the true pervert.[79] Thus some conclude that the concerted effort of home, school, and church, supplemented if need be by various forms of social ostracism, suffices to inculcate individual restraint in private sex relations,[80] and that the function of law in this sphere should be confined to public outrages or nonconsensual private wrongs.[81]

All major civilized countries except a few American states[82] apparently reflect such an attitude with regard to fornication, since not one of them makes this act a crime. In England, repeated attempts to make even adultery an offense punishable by the secular courts failed long ago.[83] The modern code of the U.S.S.R. also does not consider adultery a criminal act, although the French code, unlike the German, discriminates between the sexes in establishing and punishing this act as an offense.[84] The behavior content of sodomy where it is established as a crime is differently defined, depending on the practicability of enforcement and on the contemplated social harm of a particular act. Thus "unnatural acts" between husband and wife, masturbation (mutual or single), inter-female homosexuality, and necrophilia may be excluded from the definition, which may be so restricted as to allow prosecution only where such acts constitute a "public outrage."[85]

[79] In seeking to define a "true pervert," the law faces a problem not yet solved by psychiatry. For a discussion of difficulties encountered in defining a related condition, psychopathic personality, consult Arieff and Rotman, Psychopathic Personality—Some Social and Psychiatric Aspects, 39 J. Crim. L. 158 (1948).

[80] As to the sufficiency of these factors in the absence of formal legal sanctions, see Margold, Sex Freedom and Social Control (1926), but compare Malinowski, Crime and Custom in Savage Society (1932) as to the alleged absence of formal law in primitive societies. That Kinsey himself does not place much faith in the law as a restraint on nonmarital intercourse is inferable from table 92, Kinsey, op. cit. supra note 1, at 364, where law is not even listed as one of the deterrent attitude factors.

[81] The attitude is not novel. Application of such a law would "subject behavior perhaps at worst merely imprudent, to critical investigation; and leave the actions and behavior of innocent persons exposed to idle conjecture, to unwarrantable construction and impertinent curiosity"; whereby ". . . the indecency of the inquiries would produce more harm than prosecutions would do good." Kinsey [sic], C. J., in Smith v. Minor, 1 N.J.L. 16, 22 (1790). Similar views have been approved by Burling, Review of the Kinsey Report, 23 N.Y.U.L.Q. Rev. 540, 543 (1948); Llewellyn, The Limits of Sexual Law, in About the Kinsey Report 113, 123 (ed. Geddes and Currie, 1948); Mannheim, Criminal Justice and Social Reconstruction 5 (1946); Million, Limitations on the Enforcement of Legal Sanctions, 28 Geo. L.J. 464 (1940); Shumaker, The Enforceability of Sumptuary Laws, 32 L. Notes 25, 26 (1928); Pound, The Limits of Effective Legal Action, 27 Int. J. of Ethics 150 (1917); Bentham, Principles of Legislation, in Theory of Legislation 61–62 (6th ed. 1890).

[82] See Table 1 supra, for the population percentages involved.

[83] 3 Stephen, History of Criminal Law of England 318 (1883). For an interesting account of the current status of sex law in England (but pre-Baxter v. Baxter), consult East, Sexual Offenders—A British View, 55 Yale L.J. 527 (1946).

[84] Code Pénal (ed. Dalloz 1938) §§ 336–39 (the husband can only be prosecuted for keeping a concubine within the home); Strafgesetzbuch (Kohlrausch, 1930) § 172 (dissolution of marriage is a prerequisite to permissive prosecution).

[85] Mittermaier, Verbrechen und Vergehen wider die Sittlichkeit: Widernatürliche Unzucht, 4 Vergleichende Darstellung des Deutschen und Ausländischen Strafrechts 147 (1906).

Commentators to the German Penal Code have questioned the desirability of punishing sodomy where it consists of the voluntary acts of adults. It is argued that the admittedly greater clamor for the suppression of this less widely-distributed behavior is not based on rational considerations, because the risk of a lower birth rate and disease is no more serious than that attending other lawful types of nonmarital relations.[86] An alleged connection between psychic disturbances conducive to sodomy and those resulting in major sex crimes is properly a subject of medical investigation rather than of penal sanctions. In recent years some American states have passed statutes authorizing medical examination of suspected "sexual psychopaths" and their detention in nonpenal state institutions until they are no longer socially dangerous.[87] These states realize that the selective enforcement of sodomy or other sex statutes, while it may temporarily segregate the dangerous offender, does not insure his cure or permanent harmlessness, which is the only effective social protection. If such statutory provisions were to be generally adopted, the desirability of retaining anti-sodomy statutes could be reviewed on its merits, subject to the same considerations that apply to laws against adultery and fornication.

Modern provisions in the German and Soviet codes tend to insure the complete "voluntariness" of permissible sexual relations, and provide heavier penalties where non-permissible acts do not reflect the free will of the participating parties.[88] Sections in these codes forbid the securing of sexual gratification by virtue of an advantageous social or economic position. Many American statutes already provide special penalties for persons in charge of prisoners, patients, pupils, etc. who subvert their positions of trust in this manner. It may be desirable to expand these laws to cover business executives and government officials who might be "bribed" by offers of gratification. Such an extension could, however, multiply opportunities for extortion unless protected by rigorous procedural requirements.

Any systematic revision of current sex laws should thus not be confined to the amendment or repeal of statutes against consensual private sex acts. The Kinsey data necessitate reconsideration of the validity of the rationale underlying statutory rape, seduction, and divorce laws. The fiction that a girl of sixteen, whose deportment belies her true age to the objective observer, has no

[86] Hirschfeld, § 175 des Reichsstrafgesetzbuchs—Die Homosexuelle Frage im Urteile der Zeitgenossen (1898). See also citations in Mittermaier, op. cit. supra note 85. Comparative law and remedial aspects, with emphasis on homosexuality, are discussed in Mannheim, Criminal Justice and Social Reconstruction, c. 4 (1946).

[87] The Legal Dispositionof the Sexual Psychopath, 96 U. of Pa. L. Rev. 872 (1948). See also the approved draft of the Chicago Bar Association for "an act to provide for the commitment, care, custody, treatment, and discharge of sexually dangerous persons" (unpublished committee draft, dated Oct. 26, 1948).

[88] Strafgesetzbuch §§ 174, 175a (1)–(3). Nazi amendments have here been retained by the military government, 1 Statutory Criminal Law of Germany, 113–14 (1946). Ugolovnyi Kodeks RSFSR §§ 154, 154a (the latter amendment, added in 1934, prohibits homosexuality between males, and imposes heavy penalties for taking advantage of a superior bargaining position) (1935). See also Mannheim, op. cit. supra note 86.

legally-recognizable "will" of her own creates greater mischief than that which it is designed to cure. Applicable heavy rape penalties often induce prosecutors as well as judges to circumvent the law by charging the offender with a minor misdemeanor instead.[89] Seduction, which in reality is simply taking advantage of a promise subsequently not kept, perhaps should not be punishable as a crime, since a civil remedy transcending damages for breach of contract is too readily available in most states.[90] Whether a single act of adultery, easily faked and often condoned, should under all circumstances be a good ground for divorce is a question which legislatures might well ponder.[91] Laws relating to white-slave traffic, abortion, and the dissemination of contraceptive information also need to be modified to support a consistent approach to statutory prohibition of sin.[92]

Even though the wide circulation of the Kinsey Report will have helped crystallize broad social support for such a program, a proposal for outright repeal of laws punishing private voluntary sex acts would encounter strong opposition. The shock would be somewhat cushioned by simultaneous proposals to enact some of the new laws discussed above. Other effective methods of repeal would arouse much less organized antagonism. Thus, a stringent technical approach to the rules of evidence relating to these offenses, such as prohibition of admission of testimony of the volunteer partner for all purposes, would not produce a public outcry, but nonetheless would effectively cripple the statutes. Provisions that the offenses must in all cases be "open and notorious," or subject to a similar requirement not lending itself too readily to prompt judicial misinterpretation of "legislative intent," would accomplish a similar result. If strict enforcement of all state sex laws were decreed for a short time only, pressure for legislative repeal would become irrepressible.[93]

[89] This practice is not confined to rape cases. In the municipal court of Chicago, for example, persons guilty of adultery or fornication under Illinois law are evidently charged with the lesser offense of disorderly conduct as a matter of course. Waters, The Use of Chicago's Disorderly Conduct Ordinance (unpublished thesis for the master's degree, School of Social Service Administration, University of Chicago 1948). Significantly, the statistics of the Chicago Crime Commission do not show return of a single indictment for adultery during 1947, although they do indicate that, in more serious sex offenses excluding rape and prostitution, only about one-third of the *convicted* offenders were sent to jail. Criminal Court Record for 1947, Chicago Crime Commission (unpublished).

[90] Because of the ease in which a "promise to marry" can be feigned, abolition of the civil remedy for seduction of adult women has also been urged. Feinsinger, op. cit. supra note 48.

[91] See Schwartz, Review of the Kinsey Report, 96 U. of Pa. L. Rev. 914, 917–18 (1948).

[92] White-slavery laws should be confined to prostitution proper so as not to become convenient media for judicial morals legislation. If fewer abortions are wanted, logic and the Kinsey data would indicate the necessity for spreading contraceptive information, particularly to less sophisticated population groups. See, on this latter point, Contraceptives and the Law, 6 Univ. Chi. L. Rev. 260 (1939). On the overall problem see Russell, Why a Sexual Ethics is Necessary, in The Sex Problem of Modern Society (1931).

[93] This method of "repeal" proved surprisingly effective with regard to certain "blue laws." Morford, Ancient Blue Laws Are Cobwebs in the Legal Attics of Many States, 14 St. Gov't. 110 (1941).

While direct repeal of the fornication statutes only might be successfully advocated, this legislative approach would perpetuate an illogical distinction between fornication and other voluntary sex offenses. Legislative recognition of a greater quantum of social objection to sodomy might at first confine repeal to provisions applicable to married couples, although ultimately this offense should not be treated differently than the others.

The thriving existence of civilized societies whose criminal laws do not punish voluntary private sexual relations between adults would dispose of ungrounded fears that morality will degenerate in the absence of such laws. The powerful checks of home, school, church, and social evaluation do not require as a supplement an unwieldy law enforcement apparatus. If the criminal law is to become or remain a respected tool in the maintenance of social order, its retention in a particular instance can only be justified by its reasonable correlation to the subsumed social facts.

RECENT CASES

COPYRIGHT POOLING AND THE ANTI-TRUST LAWS

The American Society of Composers, Authors, and Publishers (ASCAP) was organized in 1914 to license the public performance for profit of musical compositions copyrighted by its members. Each member assigned all his non-dramatic performing rights to ASCAP, but retained the right to mechanically record and the right to print, publish, and vend.[1] The various types of public performance of music were licensed by ASCAP under blanket licenses covering the works of all ASCAP members at an annual fee determined by the society. In return for the rights assigned to ASCAP, members received a share of the license fees.[2] Whereas individual composers had been unable to detect infringement of the public performance rights of their copyrights, ASCAP "policed" public performances of music and gave infringers the alternative of taking a blanket license or facing suit for infringement.

After the introduction of motion pictures which had sound recorded on a film track synchronized with the pictures, ASCAP blanket-licensed theaters for the *public performance* of music in this form. At the same time, individual ASCAP members independently licensed motion picture producers to *synchronize* (record) desired musical compositions on a film, specifically excepting the right to publicly perform. The producer, in turn, rented out his film with the provision that it would be shown only in a theater with an ASCAP license for public performance of music. Eighty per cent of the music on films, some in almost every production, was copyrighted by ASCAP members. Over 17,000 theaters were blanket-licensed. The fees were computed according to seating capacity and for the average neighborhood theater were less than $100 per year.

Operators of 200 motion picture theaters brought suit under the federal anti-trust laws, asserting two claims for relief against ASCAP for violations of Sections 1 and 2 of the Sherman Act.[3] The federal district court held that ASCAP's

[1] All are separate exclusive rights in musical compositions granted by the copyright statute. 61 Stat. 652 (1947), 17 U.S.C.A. § 1 (Supp., 1948).

[2] After expenses were paid, the proceeds were split one-half to publishers and one-half to composers. Each publisher's share was determined by a board and based upon popularity, earning capacity, seniority, and the number and quality of the compositions in a publisher member's catalog. The share of each composer depended upon which of the 19 classifications he was placed in by a board. The classification depended upon length of membership, quality of compositions, popularity or vogue, and earning power for the society. Alden-Rochelle, Inc. v. American Society of Composers, Authors and Publishers, 80 F. Supp. 888, 891 (N.Y., 1948), modified 80 F. Supp. 900 (N.Y., 1948).

[3] 26 Stat. 209 §§ 1, 2 (1890), 15 U.S.C.A. §§ 1, 2 (1941). The first claim was a private right of action for treble damages for injury to property or business under 38 Stat. 730 § 4 (1914), 15 U.S.C.A. § 15 (1941). The second was a suit for injunctive relief against threatened loss or damage under 38 Stat. 730 § 16 (1914), 15 U.S.C.A. § 26 (1941).

combination of the monopolies of copyrights violated both sections. The elimination of competition among composers in the marketing of their performing rights, the blanket licensing practice, and the combination of producers and ASCAP members limiting the exhibition of films to ASCAP-licensed theaters illegally restrained trade in violation of Section 1. ASCAP's monopolistic size and power to set prices were in violation of Section 2. Although the plaintiffs failed to prove they had sustained damages, the court held that ASCAP's power to fix unfair and exorbitant prices was a constant threat which might cause loss or damage. An injunction was therefore granted rearranging the disposition of the rights of public performance for profit of music synchronized with motion picture films. The injunction in effect restrained ASCAP and its members from enforcing the motion picture performing rights of any musical compositions, restrained ASCAP from obtaining these rights, restrained ASCAP members from refusing to grant these rights to producers when they granted the synchronization rights, and restrained ASCAP members from licensing these rights to anyone but producers. *Alden-Rochelle, Inc. v. American Society of Composers, Authors and Publishers.*[4]

In an anti-trust case involving copyrights or patents, a court must make an accommodation between two policies.[5] One policy, embodied in the Sherman Act, favors competition. The other, embodied in statutes authorized in the Constitution, grants certain exclusive rights, or limited monopolies, to copyright and patent holders in order to encourage development of the arts and sciences. In determining whether the lawful restraints on trade permitted under the copyright statute were overreached so as to violate the general prohibitions of the Sherman Act, the court here followed the trend, established by the United

[4] 80 F. Supp. 888, 900 n. 2 (N.Y., 1948), as amended 80 F. Supp. 900, 903 (N.Y., 1948). Text of the amended injunction follows:

"(a) restraining ASCAP from attempting directly or indirectly to enforce the motion picture performing rights of any musical composition against anyone as long as ASCAP continues as an illegal combination and monopoly in violation of the anti-trust laws; and restraining ASCAP members, while they continue as members of ASCAP, from attempting either directly or indirectly to enforce against anyone the motion picture performing rights of which they have granted only the motion picture synchronization rights to the motion picture producer;

"(b) Restraining ASCAP from obtaining the right of public performance of any musical composition synchronized with motion picture films when such musical composition is performed publicly for profit in conjunction with the exhibition of such motion picture films;

"(c) Restraining ASCAP's members from refusing to grant to motion picture producers the right to publicly perform for profit through the exhibition of motion picture film, all musical compositions which they allow motion picture producers to synchronize with motion picture film;

"(d) Restraining ASCAP's members from licensing, except to motion picture producers, the right of public performance for profit through the exhibition of motion picture films, of musical compositions synchronized with motion picture films;

"(e) Restraining ASCAP and its members from conspiring with motion picture producers for the purpose of including a clause in contracts issued by producers to exhibitors directly or indirectly requiring exhibitors to obtain a license from ASCAP as a condition to the exhibition of the licensed pictures."

[5] See United States v. Line Material Co., 333 U.S. 287, 308–10 (1948).

States Supreme Court, toward strict construction of such statutory grants.[6] This case represents an extension to the copyright field, of limitations on patent combinations and licensing practices, and of special penalties imposed for misuse of patents in violation of anti-trust laws. In addition, the case suggests a further tightening of restrictions on methods which may be lawfully employed to obtain the reward from either a copyright or patent.

In the formation of ASCAP to maximize the revenue from the performing rights in their musical compositions, the copyright owners had resorted to one variety of a device commonly referred to in connection with patent cases as a pool.[7] The pool in this case resulted from the assignment of performing rights of many individual copyright owners to a central organization which acted as a common agency for granting blanket licenses for the aggregated copyrights.

Prior cases have developed no simple test for determining whether patent pools conform to the anti-trust or patent laws. Instead, the few cases in which pools have been involved seem to indicate that an examination into the reasonableness, market dominance, intent to monopolize, or practices of the combination is necessary to determine legality. Thus, in *Standard Oil Co. (Indiana) v. United States* the United States Supreme Court asserted that a cross licensing pool and division of royalties would be illegal "only when used to effect a monopoly, or to fix prices, or to impose otherwise an unreasonable restraint upon interstate commerce."[8] Since effective control of the industry, in the view of the Supreme Court, was not shown in that case, no violation of Section 1 or 2 of the Sherman Act was found. Furthermore, in *United States v. Vehicular Parking*, while the court found illegal practices, it stated, "Indeed, patent pools per se are not condemned . . . except where the conjoint design of persons in such acquisition and pooling is to restrain trade."[9] Where related patents on shoe machinery were found to be noncompeting, their combination in one dominant concern by a series of mergers of manufacturers in the same industry was held not in violation of the Sherman Act in *United States v. United Shoe Machinery Co.*[10] And in *United States v. General Electric Co.*,[11] the fixing of prices by the licensor of patented articles manufactured by a single licensee under a license to make and vend was approved by the Supreme Court, which ignored the existence of a pool.

[6] Ibid., at 310–11; Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661, 665 (1944); United States v. Masonite Corp., 316 U.S. 265, 280 (1942).

[7] Generally, any mutual exchange of patent rights or acquisition of such rights from others has been termed a pool. Oppenheim, Cases on Federal Anti-Trust Laws 553 (1948). "The words 'patent pool' are not words of art. The expression is used in this opinion to convey the idea of a linking of the right to use patents issued to more than one patentee." United States v. Line Material Co., 333 U.S. 287, 313 n. 24 (1948).

[8] 283 U.S. 163, 175 (1931).

[9] 54 F. Supp. 828, 839 (Del., 1944), modified 56 F. Supp. 297 (Del., 1944), judgment amended 61 F. Supp. 656 (Del., 1945).

[10] 247 U.S. 32 (1918); cf. United States v. Winslow, 227 U.S. 202 (1913).

[11] 272 U.S. 476 (1926); cf. Bement v. National Harrow Co., 186 U.S. 70 (1902).

Cases where patent pools have been condemned have been characterized by abuses. For example, in *Hartford-Empire v. United States*[12] the Court found illegal a pool which had fixed prices and uniform terms for the sale of patented articles, determined manufacturing conditions and quotas of patented articles, and fixed prices and allocated production of unpatented articles.[13] The *General Electric* doctrine has been severely limited by the finding of illegality in *United States v. Line Material Co.*[14] of a licensing arrangement with numerous producers which fixed the prices of products under licenses to manufacture and sell. Other abuses which have been considered sufficient to make a patent pool illegal are the allocation of territories,[15] and restraint of competition by price cutting and threats of infringement suits.[16]

The present case makes it clear that a pool which compels licensees to take blanket licenses or licenses in gross for pooled copyrights violates Section 1 of the Sherman Act. Although this is a copyright case, the rationale could be applied with equal force in the patent field. The holding was foreshadowed by *United States v. Paramount Pictures, Inc.*,[17] where "block booking" of motion picture films was condemned because it added to the monopoly of a single copyright that of another copyright which must be taken in order to secure the first. Such enlargement of the legal monopoly was denounced in that case in reliance on the principle of the patent tie-in cases, which forbids the owner of a patent to condition its use on the purchase or use of other patented or unpatented materials. It is true that all conditions in patent-licensing agreements are not illegal per se, according to *Transparent-Wrap Machine Corp. v. Stokes & Smith Co.*,[18] which held a license requiring assignment back to the licensor of improvement patents not illegal per se. However, in *International Salt Co. v. United States*[19]

[12] 323 U.S. 386 (1945).

[13] Other cases in which these abuses were condemned are: United States v. Vehicular Parking, 54 F. Supp. 828 (Del., 1944), modified 56 F. Supp. 297 (Del., 1944), judgment amended 61 F. Supp. 656 (Del., 1945); Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20 (1912); cf. National Harrow Co. v. Hench, 83 Fed. 36 (C.C.A. 3d, 1897) (pool fixed prices and conditions of sale for licensees). In all these cases market control had been achieved.

[14] 333 U.S. 287 (1948).

[15] United States v. National Lead Co., 63 F. Supp. 513 (N.Y., 1945). The court did not decide, however, that allocation of territory to a licensee under a patent is illegal if the allocation is simply an attempt to achieve market discrimination in order to exploit the patent and is not a previously arrived at division of territory among pooling patent holders carried through by means of patents. As in cases of patented product price-fixing under a license to manufacture and vend, legality of the practice may depend upon nonexistence of pooling or the number of licensees.

[16] Stewart-Warner Corp. v. Staley, 42 F. Supp. 140 (Pa., 1941) (motion to dismiss denied).

[17] 334 U.S. 131 (1948).

[18] 329 U.S. 637 (1947). In United States v. Paramount Pictures, 334 U.S. 131 (1948), the Stokes case was distinguished on the grounds that it applied only to improvement patents. A further tendency to limit the Stokes rule to cases where market control does not exist may be seen in United States v. General Electric Co., 80 F. Supp. 989, 1006 (N.Y., 1948).

[19] 332 U.S. 392 (1947).

the tying-in of unpatented materials with the license of a patented device was held to be illegal per se. The practice of blanket licensing similarly ties together numerous copyrights. The practice has an objectionable result similar to that in the tie-in of unpatented and patented materials—it tends to exclude copyrighted music of competing nonmembers from the market.[20] In addition, it gives the tying-in copyright owner an individual reward which need not be based on the individual merit of the monopoly he has been granted. Therefore, it would seem that compulsory blanket licensing should also be illegal per se. Such a rule would eliminate consideration of market control. Since ASCAP possessed market control, it could be said that the present case does not go that far, but the decision on the illegality of blanket licensing nevertheless was arrived at without apparent reliance on the presence of market control. Whether blanket licensing should be illegal per se where merely optional is a more difficult problem. In the *International Salt* case and in *United Shoe Machinery Corp. v. United States*,[21] optionality was not a sufficient justification for a patent tie-in. Yet in the *Paramount* case it was indicated that optional block booking would be lawful.[22] In the present case, the court ignored the option of "per piece" licensing of individual compositions afforded by ASCAP. In this case, however, the much higher cost of "per piece" licensing under the fees set by ASCAP was in effect a compulsion to use blanket licensing.[23] It seems unlikely that such disguised compulsion would mislead any court into accepting it as a justification. But even where a bona fide option of individual licensing exists, the mere existence of this alternative would not dispel all the evil effects of blanket licensing in cases where it was practiced. It is true that the exclusion of competitors from the tied-in field may not be so effective in such a case. However, the reward on each copyright is still not individualized. Furthermore, a preference of a licensee for blanket licensing in the absence of compulsion would indicate that the practice has some advantage resulting from the combination of copyrights rather than the merit of the work. Judicial sanction of the practice, consequently, would encourage other combinations in order to obtain a similar advantage. Nevertheless, the *Paramount* case seems to indicate some hesitancy of the courts to outlaw blanket licensing, or a tie-in, where it is not compulsory and where in-

[20] It has been argued that musical compositions do not compete, but in the field of popular music at least, the possibilities for substitution are so great as to seem the equivalent of effective competition.

[21] 258 U.S. 451 (1922).

[22] "We do not suggest that films may not be sold in blocks or groups, when there is no requirement, express or implied, for the purchase of more than one film. All we hold illegal is a refusal to license one or more copyrights unless another copyright is accepted." United States v. Paramount Pictures, Inc., 334 U.S. 131, 159 (1948).

[23] While the price of a blanket license was $100 per year for the average neighborhood theater, the price of a single "per piece" license was set at $10. No theater had ever requested one of the latter. Alden-Rochelle, Inc. v. American Society of Composers, Authors and Publishers, 80 F. Supp. 888, 893 (N.Y., 1948), modified 80 F. Supp. 900 (N.Y., 1948).

dividual licensing is offered on equivalent terms, should such a case arise.[24] A hesitant court could employ some of the broad language of the *Stokes* case suggesting that it is permissible to use one legalized monopoly to acquire another legalized monopoly.[25]

If the blanket licensing practice had not been employed in the present case, ASCAP probably still would have been illegal, since the decision suggests that a pool setting up a common agency for coordinated licensing of individual rights would violate Section 1 of the Sherman Act. The court stated, "Almost every part of the ASCAP structure, almost all of ASCAP's activities in licensing motion picture theatres, involve a violation of the anti-trust laws."[26] The combination "restrains competition among the members of ASCAP in marketing the performing rights of their copyrighted works."[27] Furthermore, "[t]he members share in the license fees collected through the unlawful combination. By pooling their rights and pooling the license fees derived therefrom, each in some way shares in the copyrighted work of the others. This has all the evils of 'block booking'. . . ."[28] Instead of condemning the structure of the pool in these vague terms, the decision by a more precise analysis could have resulted in a holding that any pool whose structure establishes a cooperative licensing agency is illegal per se even though the individual rights are separately licensed. Such cooperative licensing agency necessarily determines the fees or royalties charged under licenses issued, as a result of the elimination of individual rate-fixing. Thus whatever the avowed purpose of such an arrangement, it is inevitably a horizontal price-fixing agreement among the copyright or patent holders. As such, it would seem to be clearly illegal per se as a violation of Section 1 of the Sherman Act under the rule of *United States v. Socony-Vacuum Co.*,[29] unless some justification is to be found in the copyright or patent grant.[30] This would be true whether or not the prices fixed were reasonable,[31] and whether or not market control had been achieved.[32] However, in *Standard Oil Co. (Indiana) v.*

[24] In such a case it might be possible to distinguish United Shoe Machinery Corp. v. United States, 258 U.S. 451 (1922), and International Salt Co. v. United States, 332 U.S. 392 (1947). In the former there was evidence that a lease free from the objectionable conditions was granted only upon the lessee making an initial payment in cash instead of paying royalties throughout the term. In the latter, the decision indicates that the lessor merely failed to always insist upon or enforce the objectionable terms. Neither case seems to be entirely free from compulsion.

[25] Transparent-Wrap Machine Corp. v. Stokes & Co., 329 U.S. 637, 644 (1947).

[26] Alden-Rochelle, Inc. v. American Society of Composers, Authors and Publishers, 80 F. Supp. 888, 893 (N.Y., 1948), modified 80 F. Supp. 900 (N.Y., 1948).

[27] Ibid., at 894. [28] Ibid., at 895. [29] 310 U.S. 150 (1940).

[30] That such justification in the copyright grant is extremely limited may be seen from Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939), where none was recognized for setting theater admission prices by lessors of copyright films.

[31] United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

[32] United States v. Socony-Vacuum Co., 310 U.S. 150 (1940). But cf. Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933) (cooperative marketing agency held lawful where market control not found and effect on prices incidental and conjectural).

United States[33] fixing of royalties, anolagous to copyright license-fee fixing, and sharing of fees by a patent pool where effective industry control was not present, were specifically permitted. Yet it is submitted that insofar as that case permits price fixing on the grounds of lack of market control,[34] it is contrary to the more recent *Socony-Vacuum* decision and therefore not compelling. Furthermore, nothing in the copyright or patent statutes justifies the owner of one copyright or patent in fixing license fees for the copyright or patent of another, or determining his own rates by agreement with another.[35] Practical difficulties of copyright or patent holders in realizing their maximum reward without an otherwise illegal arrangement will not be given consideration by the courts.[36] Instead, the trend of recent anti-trust decisions has been to compel copyright and patent holders to obtain their reward without the aid of combinations with other holders or licensees.[37] In view of this trend and of the *Socony-Vacuum* case, the force of the *Standard Oil of Indiana* case, to the extent that it seems to uphold cooperative reward fixing through the use of a pool, seems to be considerably impaired.

Where a patent has been used to violate the anti-trust laws, the relief granted may include an order requiring some form of compulsory licensing, thereby altering the normal rights under a patent grant.[38] Application of this power of the court was extended to the copyright grant in the present case. The injunction not only prevented ASCAP from licensing producers or theater owners to perform publicly copyrighted music synchronized with motion picture film, but also prevented individual ASCAP members from splitting the licensing of the performing rights from the licensing of synchronization (recording) rights. This was done despite the fact that previous decisions had held that the right to print, publish, and vend, the right to mechanically record, and the right to perform publicly for profit are all separate rights granted by the copyright statute, which could be licensed separately.[39] Had ASCAP never been organized, it would be difficult to see any violation of the anti-trust laws in the act of an in-

[33] 283 U.S. 163 (1931).

[34] This fixing of license fees and royalties is to be distinguished from fixing prices charged by a licensee under a license to make and vend. Where two or more patentees combine them and fix prices on all devices produced under any of the patents, the arrangement would be illegal under the holding of United States v. Line Material Co., 333 U.S. 287 (1948).

[35] Compare Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939) (copyright held no justification for fixing of theater admission prices by lessor of copyrighted films). The Court there stated: "An agreement illegal because it suppresses competition is not any less so because the competitive article is copyrighted." Ibid., at 230.

[36] Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661, 681 (1944).

[37] Ibid.; United States v. Line Material Co., 333 U.S. 287 (1948); Ethyl Gasoline Corp. v. United States, 309 U.S 436 (1940).

[38] Hartford-Empire Co. v. United States, 323 U.S. 386 (1945).

[39] Remick Music Corp. v. Interstate Hotel Co., 157 F. 2d 744 (C.C.A. 8th, 1946), cert. den. 329 U.S. 809 (1947); Jewell-LaSalle Realty Co. v. Buck, 283 U.S. 202 (1931).

dividual copyright owner granting a license to producers only for the recording rights for music to be synchronized on films, and granting a separate license to theater owners for individual public performances of his composition. In fact it might be expected that the persons conducting the public performance would be the ones to obtain a license for the right. As the reason for not permitting splitting of recording rights from performing rights by individual ASCAP members, the court stated that the illegal conspiracy was based upon this splitting. To make it impossible for the scheme to continue, it was said to be necessary to prevent the splitting. But though it is clear that the splitting was necessary for the existence of ASCAP, no explanation is given as to why splitting could not continue legally with ASCAP not participating. Is splitting illegal for copyright owners who are not members of ASCAP? It may be that since the court felt that "per piece" licensing of theaters for the public performance rights to music synchronized on films was "commercially impractical," enforced dual licensing of producers was necessary to avoid stalemate. However, if "per piece" licensing of theaters by individual copyright owners were in fact not feasible, it would seem that economic self-interest of producers in making it possible for their films to be shown without musical copyright infringement would impel them to obtain public performance licenses for the music. The likelihood of such a result is supported by the fact that when producers obtained the rights to synchronize music of nonmembers of ASCAP, they secured the public performance rights as well. Thus the portion of the injunction under discussion appears to have gone beyond what was necessary to prevent a violation of the anti-trust laws.

On the other hand, it could be argued that where the copyright holder splits off the synchronization from the performance right, he has elected to take his entire reward on that synchronization right and should not be permitted any further licensing. Some support for this position may be found in *United States v. Masonite Corp.*[40] There the product was manufactured and sold by the patentee, who could not use the reward theory to justify fixing the sale prices of licensees to vend, because he had already received his reward on the sale to the licensees. Splitting off the separate right to license to vend did not in that case give rights to any additional reward. However, the disposition of the patented article by a sale makes a much stronger case for the reward having been received than the present case where the sale is absent and there has been only a license of the right to synchronize.

Still further alteration of the rights of ASCAP and its members under their copyrights was brought about by the supplementary opinion and decree in the present case. Enforcement against any one of the motion picture performing rights of any musical composition was forbidden to ASCAP so long as it continued as an illegal combination and monopoly, and was forbidden to ASCAP

[40] 316 U.S. 265 (1942).

members so long as they remained in the association.[41] In addition, the court asserted that even if a member resigned from ASCAP, he should not be able to enforce his public performance right for music which had been synchronized on films already produced during the existence of the illegal arrangement, since it was believed unlikely that any court would lend its process to enable either ASCAP or its members to profit from what they had already done through their illegal conspiracy.[42] These portions of the decree and the opinion represent an application to copyrights of two comparatively recent and related doctrines applied where patents have been used to violate the anti-trust laws or otherwise misuse the patent grant: in an action under the anti-trust laws against the illegal practices, the relief granted may restrain all suits for past infringements and restrain future infringement suits so long as the violation continues;[43] in a suit for infringement by a patentee who has misused his patent or violated the anti-trust laws, relief will be denied.[44] The result in either case is to render unenforceable the rights granted under the patent statute. In *Hartford-Empire Co. v. United States*,[45] an example of the former type case, where suit was brought for relief from violation of the anti-trust laws, the Court refused to confiscate the patent and compel royalty-free licensing, but it did go so far as to compel licensing at reasonable rates. While recovery of royalties due for prior use of the patent was restrained,[46] amounts already paid in could not be recovered.[47] Similarly in the present case without affirmative proof that the performing rights license payments resulted in damages the court would not permit their recovery back threefold in a treble damage claim. In *Morton Salt Co. v. Suppiger*,[48] an example of the second type case, where there was an infringement suit for an injunction and accounting, the doctrine applied was similar to the equitable principle of "unclean hands"; aid was withheld because the plaintiff was using the right asserted contrary to the public interest. A counterclaim for treble damages

[41] The original decree had ordered divestiture of ASCAP's rights and their return to the owners of the copyrights. Because of the probability of disputes and litigation between copyright owners and others who might claim to be entitled to the performing right, provisions of the final decree were substituted. Alden-Rochelle, Inc. v. American Society of Composers, Authors and Publishers, 80 F. Supp. 888, 900 note 2 (N.Y., 1948), modified 80 F. Supp. 900, 903 (N.Y., 1948).

[42] This statement of the court was prompted by a letter from a motion picture producer expressing fear that he would be in an impossible bargaining position with a resigned ASCAP member. The exhibitor under the injunction, could not obtain a license for the performance of the music on a film, and therefore the producer must, after having already made a huge investment in the film which he could not afford to imperil. Ibid., at 904, 905.

[43] Hartford-Empire Co. v. United States, 323 U.S. 386 (1945); United States v. Vehicular Parking, 54 F. Supp. 828 (Del., 1944), modified 56 F. Supp. 297 (1944), judgment amended 61 F. Supp. 656 (Del., 1945).

[44] Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661 (1944); Morton Salt Co. v. Suppiger Co., 314 U.S. 488 (1942); B.B. Chemical Co. v. Ellis, 314 U.S. 495 (1942).

[45] 323 U.S. 386 (1945).

[46] Ibid., at 419.

[47] Ibid., at 411.

[48] 314 U.S. 488 (1942).

under the anti-trust laws and for an injunction against further threats of infringement suits has been permitted in such a case.[49]

In a number of infringement suits brought by ASCAP members prior to the present case, the defense that ASCAP had violated the anti-trust laws was denied recognition.[50] However, the theory of the patent infringement cases has now been extended to copyright infringement cases, as Judge Leibell suggested it should be, by *Witmark and Sons v. Jensen*,[51] a decision announced subsequent to the present case. Because of misuse of the copyrights and violation of the anti-trust laws, an injunction and damages were denied in that case to ASCAP members against theater owners who had allegedly given public performances of music on films without a license. The court stated that "public interest transcended the plaintiffs' rights under their copyrights."[52]

The immediate effect of the present decision on ASCAP and the motion picture industry will be to provide what the court referred to as a "simpler and proper" arrangement whereby producers will deal directly with copyright owners for both synchronization and performing rights without the participation of ASCAP or theater owners. Since ASCAP had been assigned only public performing rights by its members and consequently did no licensing of synchronization rights, the injunction did not specifically restrain ASCAP from licensing synchronization rights, but by implication it would be barred from this activity also.

As a result of the decree, ASCAP will lose an important source of revenue. Income to the members will be decreased insofar as the total license fees which they can command will be lessened by the loss of their combined bargaining power and by any revival of competition among them as individuals in marketing their performing rights. There will be a loss also to members on all films already produced during the illegal arrangement because the member copyright owners will be unable to collect public performance license fees on these, even from producers. Losses due to unchecked infringements by producers on new films seem unlikely because of the ease with which such infringements may be detected under the new arrangement. Producers will be saddled with a new expense, the purchase of performing rights, which the court felt would be passed along to exhibitors in the form of increased rentals.[53] The injunction in this case,

[49] Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661 (1944); Mercoid Corp. v. Minneapolis-Honeywell Regulator Co., 320 U.S. 680 (1944).

[50] Buck v. Cecere, 45 F. Supp. 441 (N.Y., 1942); Buck v. Spanish Gables, 26 F. Supp. 36 (Mass., 1938); Buck v. Del Papa, 17 F. Supp. 645 (R.I., 1937); Buck v. Hillsgrove Country Club, Inc., 17 F. Supp. 643 (R.I., 1937); Witmark v. Pastime Amusement Co., 298 F. 470 (D.C. S.C., 1924); Harms v. Cohen, 279 F. 276 (D.C. Pa., 1922). But cf. Buck v. Gallagher, 36 F. Supp. 405 (Wash., 1940) (violation of anti-trust laws prevented ASCAP from obtaining injunction restraining enforcement of state statute restricting ASCAP activities).

[51] 80 F. Supp. 843 (Minn., 1948). [52] Ibid., at 850.

[53] Unless ASCAP were to go out of existence completely, in which case the compulsion of the injunction could not apply.

however, does not forbid ASCAP's functions as a central licensing organization outside the motion picture industry, nor are there any prohibitions against nation-wide policing to detect infringements.

However, the possibility exists that the traditional form of dealings between copyright owners and the entire commercial music industry may be upset by an extension of the condemnation of ASCAP's structure and activities in the present case to the licensing of musical public performance rights outside the motion picture industry. The importance of such a possibility is indicated by the fact that ASCAP in 1945 had licensed over 29,000 establishments of all types, including radio stations, hotels, bars, restaurants, and dance halls, as well as theaters, and had a membership of 1,667 composers and 226 publishers.[54] ASCAP's catalog includes approximately one million compositions.[55] If such an extension of the instant decision were made, it is difficult to predict what form future dealings might take between copyright owners and these other commercial users of music. "Per piece" licensing by an individual composer of each public performance of his work would encounter a practical drawback in the cost of processing numerous licenses and keeping track of performances.[56] An alternative would be combining the licensing of performing rights by an individual copyright owner with the license to mechanically record, as was ordered in the present case, or with the right to print and publish. Such a solution probably would require some system for keeping separate records and sheet music which are to be used for actual public performances. Otherwise, either purchasers of records and sheet music for home consumption would have to share the cost of public performance rights, or else producers of records and sheet music would have to be content with lower profit margins because of the increased expense of licensing performing rights. Any arrangement under which ASCAP is excluded probably would cause composers and publishers to lose some of their income from license fees.[57] The primary interest of the copyright

[54] The American Society of Composers, Authors and Publishers, The Story of ASCAP (misc. pamphlet). For general description of ASCAP see Cohn, Music, Radio Broadcasters and the Sherman Act, 29 Geo. L.J. 407 (1941).

[55] Alden-Rochelle, Inc. v. American Society of Composers, Authors and Publishers, 80 F. Supp. 888, 893 (N.Y., 1948), modified 80 F. Supp. 900 (N.Y., 1948).

[56] The average number of musical compositions used daily in 1939 was 300 for each radio station and 30 for each ballroom. Note, 10 Air L. Rev. 206, 207 n. 7 (1939). Even for theaters, "per piece" licensing was found commercially impractical in the present case. Alden-Rochelle, Inc. v. American Society of Composers, Authors and Publishers, 80 F. Supp. 888, 893 (N.Y., 1948), modified 80 F. Supp. 900 (N.Y., 1948).

[57] Before the existence of ASCAP there was no record of any composer obtaining income from his performing rights. American Society of Composers, Authors and Publishers, op. cit. supra note 54. Existing $250 minimum infringement damage provisions, however, would prevent a complete return to that situation. 61 Stat. 652 (1947), 17 U.S.C.A. § 101(b) (Supp., 1948). License negotiations in 1939 between ASCAP and the National Association of Broadcasters, whose members are among the principal users of music, demonstrate the powerful efforts which may be exerted to obtain lower license fees. Cohn, op. cit. supra note 54, at 420; Anti-Ascap Legislation, 9 Geo. Wash. L. Rev. 713 (1941).

laws, however, is not in reward to the copyright owner, but rather in the general benefit derived by the public from the labor of the author or artist.[18] Nevertheless, the problem remains of how great a reward is necessary to induce the release to the public of the quantity and quality of music desired by it.

RIGHTS OF UNREGISTERED SHAREHOLDERS

The plaintiff, a shareholder in the defendant corporation, filed a derivative suit requesting that the corporation be enjoined from recognizing an alleged gift of an option to purchase common stock of the corporation made by the directors to the corporation's president. At the time of the alleged gift, September 28, 1945, the plaintiff was the owner of shares which were still registered in the corporation's books in the names of his vendors. However, on January 28, 1946, prior to the commencement of the suit, the plaintiff became an owner of record. The defendant moved to dismiss arguing, inter alia, that the plaintiff lacked capacity to maintain a derivative suit because he was not the shareowner of record at the time of the challenged transaction. The defendant relied, in part, on Section 51A of the General Corporation Law of Delaware, which provides that "[i]n any derivative suit . . . it shall be averred . . . that the Complainant was a stockholder of the corporation at the time of the transaction of which he complains. . . ."[1] In denying the defendant's motion, the Delaware Court of Chancery adopted the view that an equitable owner of stock could maintain a derivative suit at common law, and that the term "stockholder" as used in Section 51A includes the unregistered owner. *Rosenthal v. Burry Biscuit Corporation.*[2]

Although the principal case reaches a result which is sound, its analysis of the practical considerations relevant to a determination of the rights of unregistered shareowners[3] is inadequate. Registration of stock ownership on the corporate records is designed to protect a corporation from conflicting claims in its relations with shareholders and to afford it a convenient means for promptly identifying persons eligible to exercise the rights of shareholders. Hence, a corporation is generally permitted to rely on its books when it must ascertain those

[18] United States v. Paramount Pictures, 334 U.S. 131, 158 (1948).

[1] Del. Rev. Code (1935) § 2083A, as amended by Del. L., c. 157 (1945).

[2] 60 A. 2d 106 (Del. Ch., 1948).

[3] Unregistered shareholders have been variously designated. They have been classified as legal owners. Compare O'Connor v. International Silver Co., 68 N.J. Eq. 67, 59 Atl. 321 (1904), aff'd 68 N.J. Eq. 680, 62 Atl. 408 (1905). But it has also been stated that while the unregistered shareowner has legal title as against the transferor, his ". . . possible legal rights . . . [as against the corporation] are of an inchoate nature." In re Giant Portland Cement Co., 21 A. 2d 697, 701 (Del. Ch., 1941). The unrecorded owner is most frequently designated an equitable shareholder as in the principal case. However, this designation is somewhat misleading in its failure to distinguish owners of beneficial interests in stock. As used here, the term "equitable shareholder" includes both the unregistered owner and the beneficial owner, although the two classes will be referred to separately when the distinction is of importance.

stockholders who are entitled to receive dividends, to vote in corporate elections,[4] to receive corporate notices, to participate in the distribution of assets upon liquidation, and to qualify for office where share ownership is a qualification.[5] However, in other circumstances where the demands of speed and certainty are not so great, the need for registration is less apparent. The rights of an equitable shareholder should be determined by balancing in each situation the inconvenience to the corporation stemming from the absence of registration against the possible injustice to the claimant that would result if relief were to be denied solely on that basis.

A mechanical approach to this question is exemplified by *Bankers National Corporation v. Barr*[6] in which a New York federal district court construed Delaware law as prohibiting the maintenance of a derivative suit for improper disposition and waste of assets by a shareholder who was not the owner of record at the time of the suit. "[E]quitable shareholders may not maintain a [derivative] suit in Delaware. . . ."[7] This conclusion was based on the Delaware Supreme Court's decision in *Salt Dome Oil Corporation v. Schenck*,[8] where an unregistered shareholder who had objected to a corporate merger and sought an appraisal of and compensation for his shares was not permitted to maintain a suit for the appointment of appraisors. The court in the instant case rejected the *Barr* decision and sought to avoid the *Salt Dome* case, which was a statutory proceeding, by distinguishing derivative suits, which are equitable,[9] from actions at law.[10] But the technical designation of the proceedings as either at law or in equity should not be decisive in determining the rights of equitable shareholders. However, both the *Barr* and the *Salt Dome* decisions could have been distinguished by the court in *Rosenthal v. Burry Biscuit Corporation*, for in those cases the plaintiffs were not registered as stock owners at the time of suit. In the *Rosenthal* case, the plaintiff's interest was recorded on the corporate records when the complaint was filed.

The holding in the *Salt Dome* case that the term "shareholder" as used in the

[4] However, where the transferor (the holder of record) acts inequitably in relation to the unrecorded transferee, his vote may be disqualified in a judicial review of an election. See In re Giant Portland Cement Co., 21 A. 2d 697, 701–2 (Del. Ch., 1941), noted in 40 Mich. L. Rev. 588 (1942); cf. Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Ringling, 53 A. 2d 441 (Del. S. Ct., 1947); In re Giant Canal Const. Co., 21 Del. Ch. 155, 182 Atl. 545 (1936). Such a disqualification is likely to cause the corporation the inconvenience and expense of a new election.

[5] Rosenthal v. Burry Biscuit Corporation, 60 A. 2d 106, 112 (Del. Ch., 1948); Graeser v. Phoenix Finance Co. of Des Moines, 218 Iowa 1112, 254 N.W. 859 (1934); 12 Fletcher, Private Corporations §§ 5489, 5500–6 (perm. ed., 1932); Ballantine, Corporations §§ 320, 329 (rev. ed., 1946).

[6] 7 F. R. D. 305 (D.C. N.Y., 1945). [7] Ibid., at 308.

[8] 41 A. 2d 583 (Del. S. Ct., 1945), noted in 31 Va. L. Rev. 698 (1945).

[9] 13 Fletcher, Private Corporations § 5944 (rev. vol., 1943).

[10] The question of whether an equitable shareholder is entitled to an equitable remedy was expressly left open in Salt Dome Oil Corporation v. Schenck, 41 A. 2d 583, 586 (Del. S. Ct., 1945).

Delaware merger and consolidation statute[11] refers only to registered holders was based, in part, upon an unsatisfactory analysis of the practical necessity for registration. It is true that the success of a merger or consolidation depends upon the number of dissenters who have to be paid off. Obviously they must be readily identified.[12] However, if the nonregistered shareholder establishes his ownership and makes known his dissent[13] within the prescribed period, his interest in the corporation is such that he should not be precluded from demanding an appraisal and compensation for his shares,[14] provided the holder of record has not assented. Indeed there may be an even more pressing need for recognizing the unrecorded shareholder's claim in this situation than when he brings a derivative suit; the period within which a dissent must be registered and a demand for payment made in order to invoke the appraisal remedy is so limited that the delay resulting from a requirement of prior recordation of ownership might handicap effective exercise of the remedy.[15] However, a cestui que trust

[11] Del. Rev. Code (1935) §§ 2091–94, as amended by 41 Del. L., c. 131 (1937), 43 Del. L., c. 132 (1941), 44 Del. L., c. 125 (1943).

[12] See Salt Dome Oil Corporation v. Schenck, 41 A. 2d 583, 589 (Del. S. Ct., 1945); Stephenson v. Commonwealth & Southern Corporation, 18 Del. Ch. 91, 156 Atl. 215 (1931), aff'd 19 Del. Ch. 447, 168 Atl. 211 (1933).

[13] The nonregistered shareholder is not entitled to receive notice of the proposed merger or to vote his approval or disapproval at a stockholders' meeting; nevertheless, it is likely that he will know of the merger, and he can register his dissent without voting. Indeed, the Delaware Statute requires that dissenters who wish to be paid off must make written objections and demands for payment. Del. Rev. Code (1935) § 2093, as amended by 44 Del. L., c. 125 (1943).

[14] In Delaware a dissenting stockholder to qualify for compensation for his shares must make a written objection prior to the stockholders' meeting, his shares must not be voted in favor of the merger, and he must make a written demand for payment within twenty days after the approved merger agreement has been filed and recorded. Del. Rev. Code (1935) § 2093, as amended 44 Del. L., c. 125 (1943). An equitable shareholder would seem capable of meeting these prerequisites. Compare Lewis v. Corroon & Reynolds Corporation, 57 A. 2d 632 (Del. Ch., 1948); In re Universal Pictures Co., 37 A. 2d 615 (Del. Ch., 1944). The authority of the latter case is subject to speculation since the decision in Salt Dome Oil Corporation v. Schenck, 41 A. 2d 583 (Del. S. Ct., 1945). However, in those states where one of the conditions precedent to payment is a negative vote it would seem that the equitable stockholder would be precluded unless the holder of record dissented. Consult SEC, Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees, Part VII, Appendix B, IV, III (1938).

There are several cases in accord with the Salt Dome case: Schwartz v. The Olympic, Inc., 74 F. Supp. 800 (D.C. Del., 1947); Application of General Realty & Utilities Corporation, 42 A. 2d 24 (Del. Ch., 1945); Goodisson v. North American Securities Co., 40 Ohio App. 85, 178 N.E. 29 (1931). Contra: Application of Friedman, 184 N.Y. Misc. 639, 54 N.Y.S. 2d 45 (1945); In re Rowe, 107 N.Y. Misc. 549, 176 N.Y.S. 753 (1919).

[15] In Delaware only twenty days need elapse between the sending of notices and the stockholders' meeting at which the proposed merger is approved or disapproved. Del. Rev. Code (1935) § 2091, as amended by 41 Del. L., c. 131 (1937), and 43 Del. L., c. 132 (1941). A dissenting shareholder must make a written objection prior to the stockholders' meeting and he must make a written demand for payment within twenty days after the approved merger agreement has been filed and recorded in order to qualify for compensation. Del. Rev. Code (1935) § 2093, as amended by Del. L., c. 125 (1943). Compare SEC, op. cit. supra note 14, at 598–604, 472–73, 531–32.

under an active trust might well be denied appraisal and compensation since the decision to approve the merger or to invoke the appraisal remedy would generally seem to be matters within the trustee's authority. But an exception should be made in the case of a voting trust because the voting trustee's close connection with management renders it unlikely that he will give independent scrutiny to the merger.[16]

The right of an equitable shareholder to inspect the corporate books and records should also hinge on practical considerations. In Delaware, only shareholders of record are allowed to make such inspections.[17] As a result, a rather anomalous situation prevails in that state—although the unregistered shareholder is permitted to maintain a derivative suit,[18] he does not have access to the corporate records to discover transactions which might give rise to such a suit.[19] It is true that permitting such an inspection by an equitable shareholder

[16] Compare Matter of Bacon, 287 N.Y. 1, 38 N.E. 2d 105 (1941), noted in 55 Harv. L. Rev. 868 (1942) where it was held that a holder of a voting trust certificate was entitled to an appraisal remedy despite the fact that the voting trustee had assented to the liquidation of the corporation in the process of reorganization. As the trust agreement was construed the trustee was without the power to consent to the destruction of the stock deposited under the agreement; that power remained in the certificate holders. The doctrine that some of the rights of stock ownership may be exercised by the trustee while others may be exercised by the certificate holder has been criticized as ". . . strik[ing] at the fundamental trust status of voting trusts and add[ing] unnecessarily to the confusion of the law." Gose, Legal Characteristics and Consequences of Voting Trusts, 20 Wash. L. Rev. 129, 140 (1945). However, the possible abuse which may arise under such complete divorcement of corporate ownership from control may well justify the "confusion." See Ballantine, Voting Trusts, Their Abuses and Regulation, 21 Tex. L. Rev. 139 (1942); Ballantine, Corporations §§ 184a–c (rev. ed., 1946); 5 Fletcher, Private Corporations §§ 2092–93 (perm. ed., 1931).

[17] "The original or duplicate stock ledger shall be the only evidence as to whom are the stockholders entitled to examine . . . the books of the corporation. . . ." Del. Rev. Code (1935) § 2061; State ex rel. Crowder v. Sperry Corporation, 2 Ter. (Del.) 84, 15 A. 2d 661 (1940) (voting trust certificate holder denied writ of mandamus to compel inspection); State ex rel. Healy v. Superior Oil Corporation, 1 Ter. (Del.) 460, 13 A. 2d 453 (1940) (person in whose name stock was registered but who was merely a nominee, held entitled to make inspection).

Unregistered shareholders have often been denied the right to inspect. State ex rel. Manlin v. Druggists' Addressing Co., 113 S.W. 2d 1061 (Mo. App., 1938); Goddard v. General Reduction & Chemical Co., 57 Utah 180, 193 Pac. 1103 (1920); In re Reiss, 30 N.Y. Misc. 234, 62 N.Y.S. 145 (1900); cf. Brentmore Estates v. Hotel Barbizon, Inc., 263 App. Div. 389, 33 N.Y.S. 2d 331 (1942), noted in 56 Harv. L. Rev. 133 (1942) (voting trust certificate holder); State ex rel. Crowder v. Sperry Corporation, 2 Ter. (Del.) 84, 15 A. 2d 661 (1940) (voting trust certificate holder); In re Hastings, 120 App. Div. 576, 105 N.Y. 834 (1907) (temporary administrator of an estate); In re First National Bank of Brooklyn, 28 N.Y. Misc. 662, 59 N.Y.S. 1042 (1899), aff'd 44 App. Div. 635, 60 N.Y.S. 1138 (1899) (unrecorded pledgee). But cf. In re Citizens' Savings & Trust Co., 156 Wis. 277, 145 N.W. 646 (1914) (unregistered pledgee); Laughlin v. Chicago Ry. Equipment Co., 185 Ill. App. 132 (1914) (holder of original stock certificates who had failed to exchange them for new ones upon a recapitalization); McGeary v. Brown, 23 S.D. 573, 122 N.W. 605 (1909) (cestui que trust).

[18] Rosenthal v. Burry Biscuit Corporation, 60 A. 2d 106 (Del. Ch., 1948). Although this case dealt with a shareholder who was only unregistered at the time of the challenged transaction the court held that equitable shareholders can maintain derivative suits.

[19] Although there have been no Delaware cases denying the right of inspection to nonregistered shareholders the language of the inspection statute would seem to bar them. Compare the Delaware statute and Delaware cases cited note 17 supra.

would result in some additional inconvenience to the corporation insofar as it would be necessary to determine that the potential inspector was not a stranger. Indeed, it is this task of deciding whether the claimant has in fact an interest in the corporation that is the principal element of corporate inconvenience in all cases involving equitable shareholders. But the burden would be upon the inspector to present evidence of his interest and the inconvenience of passing on that evidence scarcely justifies denying the right of inspection.[20]

The distinction between a "true equitable owner," such as a cestui que trust, and an unregistered shareholder should not be a basis for denying the right of inspection. The cestui's interest is sufficient to permit the inspection. Such an investigation might be essential to protect the cestui from breaches of fiduciary duty by the trustee. Under a voting trust agreement there is an even greater need for the right of inspection to be accorded holders of voting trust certificates as a means of restraining the possibilities of abuse which inhere in the voting trustee's control of the corporation.[21]

Where there has been no recordation of ownership, derivative suits create two elements of corporate inconvenience. These arise in connection with the requirements that the plaintiff first make a demand on the directors to bring suit in behalf of the corporation,[22] and in some jurisdictions, such as Delaware, that he be a shareholder as of the date of the challenged transaction.[23] The corporate officers would seem justified in refusing to respond to a demand if made by an apparent stranger. But ownership can be proved without resort to the record books. The inconvenience entailed by these requirements of passing upon the evidence of ownership can be disregarded, especially since it will occur so infrequently. In many cases even such possibilities of inconvenience will be absent, since a demand and refusal are unnecessary when futile.[24] Moreover, prior registration could prejudice a plaintiff by occasioning sufficient delay to preclude the

[20] A corporate officer who improperly refuses to permit an inspection may be liable for damages or in some states subject to a statutory penalty. 5 Fletcher, Private Corporations §§ 2256–57 (perm. ed., 1931). However, it does not follow that recordation of ownership is indispensable to his protection. The officer is under no duty to permit inspections by strangers. Hence, he would only be inconvenienced to the extent of having to pass on the evidence of interest presented by the potential inspector. The hazard of a court not sustaining his determination that the evidence was inadequate does not seem sufficiently extraordinary to require the restriction of inspections to only shareholders of record.

[21] Statutes in a number of states provide for inspections by holders of voting trust certificates. Ill. Rev. Stat. (1947) c. 32, § 157.45; Cal. Civ. Code (Deering, 1941) § 355. In New York the inspection is restricted to the books of the trustees and the lists of the certificate holders. N.Y. Stock Corporation Law (McKinney, Supp. 1948) § 50. Compare Bresnick v. Saypol, 57 N.Y.S. 2d 904 (N.Y. S. Ct., 1945). However, the statute is not exclusive and a holder of a voting trust certificate may have a remedy at common law or in equity. Brentmore Estates v. Hotel Barbizon, Inc., 263 App. Div. 389, 394, 33 N.Y.S. 2d 331, 336 (1942), noted in 56 Harv. L. Rev. 133 (1942).

[22] 13 Fletcher, Private Corporations § 5963 (rev. vol., 1943).

[23] Del. Rev. Code (1935) § 2083A, as amended by 45 Del. L., c. 157 (1945); cf. 13 Fletcher, Private Corporations § 5981 (rev. vol., 1943 and Supp., 1948).

[24] 13 Fletcher, Private Corporations §§ 5963, 5965 (rev. vol., 1943).

prevention of a wrong through injunctive relief.[25] Although a distinction has been drawn between a cestui que trust and an unrecorded stockholder on the basis that the trustee has the legal title,[26] that distinction should not prevent the cestui from maintaining a derivative suit.[27] He has sufficient interest in the preservation of the corporation, and his suit will produce no greater inconvenience than a suit by an unregistered shareholder. These factors, although not articulated, account for the fact that most courts have permitted equitable shareholders to maintain derivative suits.[28]

In *Rosenthal v. Burry Biscuit Corporation* the plaintiff presented a strong case for being allowed to maintain his derivative suit. Since he was the owner of record when he brought suit, the precise issue was whether he could challenge the alleged gift which was made while he was the unregistered owner of his shares. Section 51A requiring concurrent ownership is pointed at preventing the purchase of causes of action through the purchase of shares of stock,[29] and is

[25] Compare Ernst v. Elmira Municipal Improvement Co., 24 N.Y. Misc. 583, 587, 54 N.Y.S. 116, 120 (1898).

[26] O'Connor v. International Silver Co., 68 N.J. Eq. 67, 59 Atl. 321 (1904), aff'd 68 N.J. Eq. 680, 62 Atl. 408 (1905).

[27] However, it may be necessary to join the trustee as a party defendant and to show that he improperly refused or was unable to bring the derivative suit on behalf of the trust himself. Compare Hall v. M. B. O'Reilly Realty & Investment Co., 306 Mo. 182, 267 S.W. 407 (1924); 4 Bogert, Trusts and Trustees, § 870 (1948); 2 Scott, Trusts § 282.1 (1939).

[28] Nonregistered shareholders: H. F. G. Co. v. Pioneer Publishing Co., 162 F. 2d 536 (C.C.A. 7th, 1947); Gallup v. Caldwell, 120 F. 2d 90 (C.C.A. 3d, 1941); Litwin v. Allen, 168 N.Y. Misc. 205, 4 N.Y.S. 2d 55 (1938); 13 Fletcher, Private Corporations § 5979 (rev. vol., 1943 and Supp., 1948) and cases cited; 12 Fletcher, Private Corporations, § 5507 and cases cited. Contra: Bankers National Corporation v. Barr, 7 F.R.D. 305 (D.C. N.Y., 1945); Brown v. Duluth, M. & N. Ry. Co., 53 Fed. 889 (C.C. Minn., 1893). Holders of beneficial interests: Law v. Alexander Smith & Sons Carpet Co., 271 App. Div. 705, 68 N.Y.S. 2d 143 (1947); Overfield v. Pennroad Corporation, 42 F. Supp. 586 (D.C. Pa., 1941); 13 Fletcher, Private Corporations, § 5976 and cases cited. Contra: Pflug v. Dietz, 260 App. Div. 503, 22 N.Y.S. 2d 968 (1940), noted in 54 Harv. L. Rev. 1063 (1941); Miller v. Miller, 256 App. Div. 846, 9 N.Y.S. 2d 448 (1939), aff'd 280 N.Y. 716, 21 N.E. 2d 212 (1939).

Closely analogous to derivative suits by equitable shareholders are "double derivative" suits in which stockholders in parent corporations are permitted to sue for wrongs to a subsidiary corporation. Compare Ballantine, Corporations § 148 (rev. ed., 1946); Remedies of Stockholder of Parent Corporation for Injuries to Subsidiaries, 50 Harv. L. Rev. 963 (1937); 154 A.L.R. 1295 (1945).

A somewhat fanciful situation, in which the nonregistered owner would probably be estopped from maintaining a derivative suit would arise if his transferor, the holder of record, consented to the transaction subsequent to the transfer. The transferee, by not registering, permits his predecessor to hold himself out as owner. Participation in, consent to, or ratification of the transaction is generally sufficient to bar a plaintiff if the consenting party was his predecessor and the consent was given prior to the transfer. 13 Fletcher, Private Corporations §§ 5862, 5866, 5874, 5882 (rev. vol., 1943); Ballantine, Corporations §§ 148, 151 (rev. ed., 1946).

[29] Compare Wood, Survey and Report regarding Stockholders' Derivative Suits 12–15, 21–25 (N.Y. Chamber of Commerce, 1944); Wolfson, Striking Out "Strike Suits," 39 Fortune, No. 3, at 137 (March, 1949); House, Stockholders' Suits and the Coudert-Mitchell Laws, 20 N.Y.U.L.Q. Rev. 377 (1945); Carson, Further Phases of Derivative Actions against Directors, 29 Corn. L.Q. 431, 454–59 (1944). In so recognizing the purpose of Section 51A

not designed to disqualify such plaintiffs. There was no cause of action at the time of the plaintiff's purchases. It is impossible to perceive how the public policy against strike suits could be offended by permitting derivative suits under these circumstances.

RIGHT OF MINOR CHILD TO SUE PARENTS FOR SUPPORT

The petitioner, an only child, had been placed in her mother's custody by an Indiana court which granted a divorce to her mother, but, because of the father's being outside of Indiana, did not enter an order requiring him to support his child. A petition in equity was filed in the circuit court of DuPage County, Illinois, on behalf of the minor child, by her mother as next friend, to compel the father to contribute to her support, but was dismissed on the ground that no cause of action was stated, and that the court had no jurisdiction of the subject matter. The appellate court, reversing, stated that they would not allow the father to escape his legal obligation to support his child by absenting himself from the jurisdiction of the court which granted the divorce, and held that a minor whose parents were divorced in another state could maintain a petition for support in a court of equity in Illinois where the father was domiciled. *Parker v. Parker*.[1]

It is not surprising that in many respects a husband's duty to support his wife and a father's duty to support his child are enforced by similar proceedings, for both relationships arise from the establishment of a family unit. However, in the absence of legislation, the courts have experienced greater difficulty in adequately enforcing the father's than they have in enforcing the husband's duty.

The common law recognized that the husband was under a legal obligation to support his wife, but because of her incapacity to sue, that duty was only enforceable indirectly. Thus, if the husband and wife were separated, and the wife had not forfeited her right to support by her own wrongful acts, a third party who had provided her with necessaries could recover from the husband under the theory that the wife was the husband's agent.[2] "Necessaries" here meant items which were essential to the wife's health and comfort, and commensurate with the husband's income.[3]

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the Delaware Court in the principal case joined the New York courts in their interpretation of the similar New York statute. N.Y. Gen. Corp. Law (McKinney, Supp., 1948) § 61; cf. Myer v. Myer, 187 N.Y. Misc. 769, 64 N.Y.S. 2d 540 (1946); Coane v. American Distilling Co., 182 N.Y. Misc. 926, 49 N.Y.S. 2d 838 (1944).

[1] 335 Ill. App. 293, 81 N.E. 2d 745 (1948).

[2] Madden, Persons and Domestic Relations 190 (1931). This agency was implied as a matter of law.

[3] Jordan Marsh Co. v. Cohen, 242 Mass. 245, 136 N.E. 350 (1922); Raymond v. Cowdrey, 19 N.Y. Misc. 34, 42 N.Y. Supp. 557 (1896).

A husband who neglected or abandoned his wife was not subject to criminal prosecution at common law, but statutes patterned on the English statute of 43 Eliz. c. 2 (1601) in practically all of the states now make the husband criminally liable for desertion or nonsupport of his wife.[4] By means of the suspended sentence or parole, the threat of punishment may be used to induce a defaulting husband to support his wife, but these statutes were designed only to prevent the wife from becoming a public charge and do not generally compel the husband to provide support according to his wife's position and his ability to pay. They only afford a quick remedy to supplement the more slowly obtained but more complete separate maintenance or alimony remedy which is usually available to the wife.[5]

Relief agencies in all of the states provide maintenance for poor persons, and in addition, in most jurisdictions, "poor laws" make the relatives of poor persons liable for their support. Here again, however, the level of support which is to be provided is only that necessary to prevent the pauper from becoming a public charge.[6]

That the standard of relief provided by these statutes, and the difficulties attendant to the procurement of necessaries from a third person made the wife's remedy grossly inadequate was even more apparent when viewed in the light of the level of support which the courts decreed as alimony in divorce actions, or which is available to the wife under separate maintenance statutes.[7] From earliest times, when a divorce *a mensa et thoro* was granted, courts decreed alimony, not at the subsistence level, but in accordance with the husband's ability to pay, usually awarding approximately one-third of the husband's income.[8] In the United States, all jurisdictions which permit divorce provide some method for enforcing the husband's continuing duty to support his wife,[9] usually by an allowance of alimony which is to be "just" or "suitable" or "equitable."[10] In addition, statutes in most states permit the wife to bring civil proceedings to enforce this duty although there is no divorce, when the husband

[4] 3 Vernier, American Family Laws § 162 (1935).

[5] "The statutes provide an additional and quick remedy . . . to punish the guilty husband for his offense and at the same time prevent the wife from becoming a public charge. They give no civil remedy." Heflin v. Heflin, 177 Va. 385, 398, 14 S.E. 2d 317, 321 (1941). In approving of the above language, the court in McClaugherty v. McClaugherty, 180 Va. 51, 67, 21 S.E. 2d 761, 768 (1942), went on to say, "What is said there in regard to a deserted wife is most apposite when applied to the case at bar. The principle involved is the same. Neither in law nor in morals should a distinction be drawn between the right appertaining to a deserted wife and the right appertaining to a neglected child."

[6] For a discussion of Poor Law provisions and Relief Agency activities in the United States consult Clarke, Social Legislation 445–557 (1940); 4 Vernier, American Family Laws § 234 (1935).

[7] Madden, Persons and Domestic Relations 330 (1931).

[8] Ibid., at 320, 322; 2 Vernier, American Family Laws § 107 (1935).

[9] 2 Vernier, American Family Laws § 105 (1935).

[10] Ibid., § 107.

has neglected to support her, or when any cause for divorce exists.[11] These alimony and separate maintenance statutes, as enforced by ordinary equity remedies and by many special statutes,[12] thus assure to the wife support at a level consonant with her station and with her husband's ability to pay, the criminal statutes, poor laws, and implied agency remedies being used only when the more complete remedy is impracticable or is not available.

It would seem that the best interests of society would require enforcement of the father's obligation to support his children to the same extent that it requires enforcement of his obligation to support his wife, but effective recognition of the duty owed to the child has always lagged behind the enforcement of the duty owed to the wife. At common law in England it was well settled that the father's duty to support his child was legally unenforceable because it was only a moral obligation,[13] and therefore neither the child nor a third person who had furnished necessaries for the support of the child had any action against the father.[14] This rule was too harsh to earn wide acceptance in the United States,[15] and to provide some legal remedy for securing the child's support, the courts resorted to the fiction that "the moral obligation of the father to support his infant child is sufficient to raise an implied promise to pay for necessaries furnished to the child by a stranger."[16] This remedy is inadequate, for under it the child is not guaranteed any support in advance but must persuade tradesmen, physicians, or others to provide him with necessaries despite the fact that their recovery from the father may depend on future litigation. To recover, the tradesman must show that the articles provided were in fact "necessaries," and the courts, in their desire to prevent meddlers from interfering with the father's right to determine what support shall be furnished his child, have given this word a stricter meaning than they do when it is used in connection with the wife's agency of necessity.[17] In addition, if the father is furnishing some reasonable support, the tradesman cannot recover, for then there is no breach of his obligation to support.[18]

The limited availability of this enforcement procedure was further restricted by some early cases which held that since the father's duty to support his child and his right to the child's custody and services were reciprocal, when he had

[11] Ibid., § 139. [12] Ibid., § 108.

[13] Madden, Persons and Domestic Relations 383 (1931); Peck, Domestic Relations 361 (3d ed., 1930); 4 Vernier, American Family Laws 56 (1935).

[14] Mortimore v. Wright, 6 Mees. & W. 481 (Exch., 1840); Seaborne v. Maddy, 9 Car. & P. 497 (1840); Urmston v. Newcomen, 4 Ad. & Ell. 899 (1843); Baceley v. Forder, L.R. 3 Q.B. 559 (1867).

[15] Peck, Domestic Relations 363 (3d ed., 1930).

[16] Huke v. Huke, 44 Mo. App. 308 (1891).

[17] Compare Rapoport v. Hussey, 145 Tenn. 583, 267 S.W. 68 (1924), and Cheever v. Kelly, 96 Kan. 269, 150 Pac. 529 (1915), with text cited note 3 supra.

[18] 4 Vernier, American Family Laws 56 (1935); Peck, Domestic Relations 363 (3d ed., 1930).

been deprived of the right, he was relieved of the obligation.[19] An exception to the rule was generally recognized when the father forfeited his right to the child's custody and services because of his own wrongdoing.[20] In the later cases it was at least openly stated that the father's obligation to support his children springs simply from the nature of the parental relation, and that this duty continued in the absence of the right to custody and services.[21] This theory is accepted by the principal case which states that "[t]his obligation of the father to support his minor child is not affected by the decree granting a divorce, nor by the decree granting the care and custody of his child to his wife or some other suitable person. His children are of his blood. It is not their fault that their parents have been divorced. It is their right to be given care by those who brought them into the world until they are old enough to take care of themselves."[22]

In all American jurisdictions, by statute, the father's failure to support his minor child is punishable as a crime.[23] While the threat of criminal punishment may prevent the child from becoming a public charge, support consonant with the father's ability to pay and with the child's station in life is not generally contemplated by these statutes. Poor laws which permit relief agencies or the pauper to maintain an action against the parent for support are also generally available, but they suffer from the same subsistence-level-of-support inadequacy.[24]

The limited support afforded the child by the common law, poor laws, and criminal statutes, resulting from the reluctance of courts and legislatures to interfere with the parental prerogative in this area, restricts the utility of these remedies. When the family unit has been destroyed and the father does not have custody of the child, such reluctance is inappropriate, as it only enables the father to escape his continuing duty to provide support, to the injury of the innocent child. Therefore, when pursuant to a divorce the mother is given custody of the child, the father's obligation is usually enforced by including as an item of the mother's alimony a sum sufficient to maintain the child according to his station in life, limited only by the father's ability to pay. In almost all states which grant absolute or limited divorces, statutes provide that the court which grants the divorce shall have full discretion as to the amount of support which shall be decreed as long as the amount is right, just, proper, reasonable, expedient, etc.[25] In addition, most states have statutes dealing with the custody and

[19] Madden, Persons and Domestic Relations 389 (1931); Peck, Domestic Relations 365 (3d ed., 1930).

[20] Madden, Persons and Domestic Relations 386 (1931).

[21] Liebold v. Liebold, 158 Ind. 60, 62 N.E. 627 (1902).

[22] Parker v. Parker, 335 Ill. App. 293, 81 N.E. 2d 745 (1948), quoting from Kelley v. Kelley, 317 Ill. 104, 110, 147 N.E. 659, 661 (1925).

[23] 4 Vernier, American Family Laws 60 (1935).

[24] Texts cited note 6 supra.

[25] 2 Vernier, American Family Laws §§ 95, 131 (1935).

maintenance of children of separated parents which describe, in similar terms, the support which the court in its discretion may provide for the child.[26]

In the light of the ample protection afforded the child by these statutes, it seems strange that no comparable protection is provided when the father neglects to support his child and statutory protection is not directly available. Thus, where, as in the principal case, the court which granted the divorce cannot compel the father to support his child because the father is not within its jurisdiction, or where the parents have been living apart and the mother who has been supporting the child dies, the child cannot usually maintain an action against the father for support[27] and is therefore limited to the protection provided by the poor laws, criminal statutes, and implied contract remedy. One reason the courts have frequently given for this result is that, since the legislature has provided for methods for the enforcement of the father's obligation in the most common or most compelling situations (e.g., a divorce proceeding when both parents are within the court's jurisdiction, poverty, and willful neglect of the child), they are therefore not justified in going beyond these statutes by providing another remedy for the breach of this duty in the uncommon situation where the statutory remedy is incomplete or unavailable.[28] The contention that providing a method for enforcing this duty is a matter for the legislature, while based on the sound dogma that the courts should not usurp a legislative function, ignores the considerations on which that rule is based by abrogating the legislative policy underlying the existing remedial statutes. A court of equity may properly provide for the enforcement of such a well-recognized right when the child would be remediless simply because a form to fit his circumstances is not provided by statute.[29]

Another reason frequently given by the courts is that a child should not be allowed to sue his father for support because such actions would disrupt the peace and repose of families and of society and would let a contentious child threaten his father with a suit to test the sufficiency of the support which was being provided.[30] It is the father's prerogative to determine the level of the

[26] Ibid., § 142. See Turrentine, The Trial Judge Decrees Maintenance, 10 Law & Contemp. Prob. 747 (1944); Whitmore, Maintenance on Appeal, 10 Law & Contemp. Prob. 757 (1944).

[27] See cases cited note 30 infra.

[28] Sikes v. Sikes, 158 Ga. 406, 123 S.E. 694 (1924). ". . . [T]he only provisions for compelling future support of a child . . . are contained in the Domestic Relations Court Act." Schacht v. Schacht, 58 N.Y.S. 2d 54, 61 (1945). "While we have no doubt of the power of the legislature to so amend our statutes as to empower the courts to decree and compel the payment of allowances for the support of dependent minors as against a parent, . . . independent of divorce proceedings, yet we are compelled under the existing statutes to deny such relief, when not sought in a divorce suit. . . ." Cunningham v. Cunningham, 120 Tex. 491, 503, 40 S.W. 2d 46, 51 (1931).

[29] Some courts have recognized that the statutory remedies are not exclusive. McClaugherty v. McClaugherty, 180 Va. 51, 21 S.E. 2d 761 (1942); Campbell v. Campbell, 200 S.C. 67, 20 S.E. 2d 237 (1942).

[30] Rawlings v. Rawlings, 121 Miss. 140, 83 So. 146 (1919); Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891); Worthington v. Worthington, 212 Mo. App. 216, 253 S.W. 443 (1923);

child's support as a necessary incident of his right to educate the child according to his wishes. Unfortunately, many courts have applied these doctrines without paying attention to the facts of a particular case, and without regard for the best interests of the child.[31] If the father has shown that he is an unfit person to control his child's support and education, and has neglected the child, he is allowed to profit by his own wrong if no action to compel him to provide support beyond that contemplated by the poor laws is permitted. The same manifest injustice exists when the father is not within the jurisdiction of the court which grants his divorce, for it is thereby prevented from entering an order for the support of the child. Here the repose of the family has already been destroyed, and when the mother has the custody of the child and the attendant right to determine its proper level of support, there is no policy reason why the child's right to the maximum standard of support should be abrogated.[32]

A few states have statutes which fix the support which the parent must provide for the child as that suitable to his circumstances, a standard similar to that granted to the wife by alimony and separate maintenance statutes.[33] However, in contrast to the detailed enforcement procedures available to the wife, no method for the enforcement of these statutory rights is expressly provided. The reluctance of the courts to allow the child to maintain a civil action against his parents for support would probably restrict enforcement to actions by third parties, which might limit the effect of these statutes merely to a broadening of the definition of "necessaries" in the common-law implied contract remedy.

More recently courts have held that, since the primary liability of the father for the support of his child continues even after the father has been deprived of its custody, equity will not allow him to escape that obligation.[34] If the father is not providing support consistent with his ability to pay and with the child's station in life, these courts hold that equity will create a remedy and permit the child to sue his father by his next friend for that support if no other complete remedy is available.[35] The father cannot limit his liability for support by a con-

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McKelvey v. McKelvey 111 Tenn. 388, 77 S.W. 664 (1903); Buchanan v. Buchanan, 170 Va. 458, 197 S.E. 426 (1938).

[31] See cases cited note 30 supra.

[32] The inapplicability of this policy where the family is already broken because of divorce has been recognized by some of the courts which have allowed the child to maintain an action for support against his father. Campbell v. Campbell, 200 S.C. 67, 20 S.E. 2d 237 (1942); Simonds v. Simonds, 154 F. 2d 326 (App. D.C., 1946); Green v. Green, 210 N.C. 147, 185 S.E. 651 (1936).

[33] 4 Vernier, American Family Laws 58 (1935).

[34] Kemp v. Kemp, 332 Ill. App. 432, 75 N.E. 2d 385 (1947); Johnson v. Johnson, 239 Ill. App. 417 (1926); Buchanan v. Buchanan, 170 Va. 458, 197 S.E. 426 (1938); Pickelsimer v. Critcher, 210 N.C. 779, 188, S.E. 313 (1936).

[35] Schneider v. Schneider, 141 F. 2d 542, 544 (App. D.C., 1944). The court stated that although ". . . [s]ome decisions in other jurisdictions give the child no rights to enforce the duty of support . . . these cases are contrary to the established principle that where a duty exists, equity will provide a remedy for its violation." McClaugherty v. McClaugherty, 180

tract with the mother, for, although such a contract may be binding on the parties, it will not be allowed to conclude the child's rights.[36] Nor can the father limit his liability for supporting his child by personally appearing in the court of a foreign jurisdiction which grants his divorce, and which decrees an amount for the support of the child. The child's rights are determined by the law of the family's domicil, and the court of that domicil will entertain a suit on behalf of the child by his next friend in order to determine for itself the proper amount to be given for the support of the child.[37] These courts recognize the inapplicability of the policy notions ruthlessly applied by the older cases, and refuse to sacrifice the welfare of the child to uphold an abused parental privilege.

In refusing to follow the only other Illinois case which presented the question of the right of a child to sue his father for support,[38] the court in the principal case seems to have been moved by the palpable injustice of enabling the father to escape his legal obligation by simply staying out of the jurisdiction of the court which granted the divorce. The decision is placed largely on the ground that equity which has plenary jurisdiction over infants will be moved by this injustice and will not permit the child to go remediless simply because no other enforcement procedure is available. The court's decision establishes the procedure necessary to full enforcement of the child's right in the absence of adequate traditional remedies by indicating that the father's liability for the support of his child is not reciprocal to his right to the custody and services of the child, but is founded in the mere fact of parentage, and by making the measure of his liability his ability to pay and the child's station in life. In effect it gives the child a right analogous to the wife's action for separate maintenance, thus rightly providing a member of the family whose position is similar to that of the wife with protection akin to that given to the wife.[39]

Va. 51, 21 S.E. 2d 761 (1942); Campbell v. Campbell, 200 S.C. 67, 73, 20 S.E. 2d 237, 239 (1942), where the court said, "This in our opinion is the only effectual remedy to insure [the children's] support. To so hold does not in any way conflict with the public policy of this State."

[36] Commonwealth ex rel. Rossi v. Rossi, 161 Pa. Super. 86, 53 A. 2d 887 (1947). This is also the rule in jurisdictions which do not allow the child to maintain an action against his father by his next friend. In these jurisdictions the child's success in recovering an amount in excess of that contemplated by the contract depends upon the methods for enforcing his father's obligations that are open to him. Yost v. Yost, 172 Md. 128, 190 Atl. 753 (1937); Worthington v. Worthington, 212 Mo. App. 216 (1923).

[37] Schneider v. Schneider, 141 F. 2d 542 (App. D.C., 1944).

[38] Hawkins v. Hawkins, 288 Ill. App. 623, 6 N.E. 2d 509 (1937).

[39] "What is said . . . in regard to a deserted wife is most apposite when applied to the case at bar. The principle involved is the same. Neither in law nor in morals, should a distinction be drawn between the right appertaining to a . . . wife and the right appertaining to a neglected child." McClaugherty v. McClaugherty, 180 Va. 51, 67, 21 S.E. 2d 761, 768 (1942); Buchanan v. Buchanan, 170 Va. 458, 197 S.E. 426 (1938).

INTER-COUNT REFERENCE ON MOTION TO DISMISS UNDER THE ILLINOIS PRACTICE ACT

The plaintiff had undertaken to supply refrigerator tool kits to the Navy, and the defendant sub-contracted to pack them. The first of the three counts in the complaint alleged an erroneous duplicate payment for some of the first kits packed. The second count set forth a breach of contract and waiver under duress. The third described a contract termination settlement in which the plaintiff paid allegedly excessive charges under duress; the settlement included a credit item for duplicate payment. The defendant's motion to dismiss was sustained by the trial court. The appellate court affirmed, holding that the second and third counts did not state facts sufficient to constitute duress and that the credit item alleged in count three must defeat the plaintiff's claim for duplicate payment in count one. *Fred C. Kramer Company, Inc. v. Hebard Storage Warehouses, Inc.*[1]

By setting forth in the third count the termination settlement containing the credit item, the plaintiff unavoidably anticipated a defense of accord and satisfaction to his claim in the first count for money paid under mistake. Yet the same showing of duress which was necessary to the plaintiff's recovery in the third count would also negative the defense. Hence the court took the view that unless the plaintiff could win on the issue of duress he must lose on both the first and third counts.[2] By relating the third count to the first in this manner, however, the court violated the common-law rule of pleading that a count, which must state a complete cause of action, can not be supported or attacked by matter set forth in other counts if not specifically referred to.[3] Application

[1] 336 Ill. App. 150, 82 N.E. 2d 832 (1948).

[2] Apart from the fact that separate counts are used and the non-reference rule is therefore involved, as discussed below, the court appears to have violated the common-law pleading rule that anticipated defenses and matter related thereto are surplusage and cannot be taken advantage of by the defendant on demurrer. Lesher v. United States Fidelity & Guaranty Co., 239 Ill. 502, 88 N.E. 208 (1909). The equity practice, on the other hand, held that the demurrer would be sustained unless the original or amended bill controverted such defense. Gunton v. Hughes, 181 Ill. 132, 54 N.E. 895 (1899); Eldridge v. Pierce, 90 Ill. 474 (1878). Although the Civil Practice Act merges legal and equitable systems of pleading, Ill. Rev. Stat. (1947) c. 110, § 155, it remains silent on the question of which of these two particular rules shall prevail. The equity rule has been recommended by Clark as the better practice under the codes. Clark Code Pleading 252 (1947). Further, the equity rule has been adopted by the Act for the defense of the statute of limitations, Ill. Rev. Stat. (1947) c. 110, § 172 (f), and by the courts to the extent that a reply is held not to be necessary where the allegations of the complaint sufficiently meet the defense raised in the defendant's answer. In re Braun's Estate, 330 Ill. App. 322, 71 N.E. 2d 364 (1947); Gliwa v. Washington Polish Loan & Building Ass'n., 310 Ill. App. 465, 34 N.E. 2d 736 (1941); City of Flora v. Bryden, 300 Ill. App. 1, 21 N.E. 2d 323 (1939). By following the equity rule the instant court decided the substantive issues and avoided further pleadings, in keeping with the goal of the Act. Ill. Rev. Stat. (1947) c. 110 § 128.

[3] Ross v. Chicago & Alton R.R., 225 Ill. App. 633 (1922); Porter v. Drennan, 13 Ill. App. 362 (1883); Burnap v. Dennis, 3 Scam. (4 Ill.) 478 (1842); 41 Am. Jur. 365 (1942); 31 Cyc.

of this rule would have required the court to find the first count good against the motion to dismiss, because on its face it stated a complete cause of action.[4] The court would then have either granted the defendant leave to answer, or ordered a trial. Either of these alternatives, however, would eventually present the same issue of law which faced the instant court when it departed from the common-law non-reference rule.[5] By sidestepping that rule the court was able to pass on the substantive merits of the case, while avoiding the delay and expense of further proceedings.[6]

The Illinois Civil Practice Act and Rules[7] make no mention of the common-law non-reference rule. Consequently, whether the court was justified in abrogating the rule in the instant case can only be decided by considering the development of the rule and its place in the modern practice. Counts were first used to join in one complaint controversies that previously had formed the basis of separate lawsuits.[8] The non-reference rule probably first functioned as a guarantee that no prejudice would result from the joinder of a bad claim with a good one. Later, pleaders began to state in separate counts what was essentially the same controversy, preserving, however, the fiction that each count actually referred to a different set of facts.[9] This practice developed because the pleader might be uncertain of his facts or of the theory on which recovery could be had. Yet he could not plead duplicitously by stating in one count more than one ground sufficient to support the relief sought,[10] nor could he set forth alternative allegations.[11] Yet by pleading only one version of his

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123 (1909); 1 Chitty's Treatise on Pleading 429 (7th Eng. ed., 16th Am. ed., 1879). Contra: Lake Shore & Michigan Southern Ry. v. Hessions, 150 Ill. 546, 37 N.E. 905 (1894).

[4] Barzowski v. Highland Park State Bank, 371 Ill. 412, 21 N.E. 2d 294 (1939) (a motion to dismiss will not be sustained if there are one or more good counts).

[5] The defendant's answer would allege the credit as accord and satisfaction, and the plaintiff would reply with allegations of duress. The same issues of the credit and duress would be developed at a trial.

[6] Compare the line of California cases holding that where a complaint contains both a special count and a common count based on the same set of facts, and the special count is held insufficient in law, the common count must fail. Orloff v. Metropolitan Trust Co., 17 Cal. 2d 484, 110 P. 2d 396 (1941); Fruns v. Albertsworth, 71 Cal. App. 2d 318, 162 p. 2d 666 (1945); Hays v. Temple, 23 Cal. App.. 2d 690 73 P. 2d 1248 (1937); see Note, 30 Calif. L. Rev. 585 (1942).

[7] Ill. Rev. Stat. (1947) c. 110, §§ 125–259.

[8] Second Report by the Commissioners on the Practice and Proceedings of the Superior Courts of Common Law 35 (Parlt., 1830).

[9] The tenacity of this fiction is indicated by the advice to the pleader given by both Stephen and Chitty that he refer in later counts to "other" goods and to "the further sum." Stephen, A Treatise on the Principles of Pleading in Civil Actions 261 (3rd Am. ed. from 2nd London ed., 1901); 1 Chitty's Treatise on Pleading 429 (7th Eng. ed., 16th Am. ed., 1879).

[10] Stephen, op. cit. supra note 9, at 242.

[11] Stephen, op. cit. supra note 9, at 339; Chitty, op. cit. supra note 9, at 260. In one sense duplicitous allegations are alternative because only one is necessary to support the relief asked. See McCaskill, Illinois Civil Practice Act Annotated 104 (1933). However, "alternative"

claim, he risked dismissal if the trial developed the slightest variance between pleading and proof.[12] Consequently, he sought protection by stating the possible variations of his claim in separate counts. The non-reference rule thus served a second function: that of assuring the pleader that the rules against duplicitous and alternative pleadings would not apply as though he had set forth everything in one count.[13]

The common-law non-reference rule would not have performed either of the two functions in the instant case. When the plaintiff stated and negatived in the third count a defense to the claim in the first, he did not plead duplicitous or alternative statements of one cause of action. Nor did he set forth separate causes of action, since a different result would not have occurred if he had brought a separate action for duplicate payment alone. The defendant's allegation of the credit, and the plaintiff's reply of duress, would then have presented the same issues of law on the pleadings as in the instant case, with the same result. The plaintiff would be in a still worse position if he had first brought an action to set aside the termination settlement for duress, because an adverse judgment would probably bar a later action for duplicate payment.[14]

The strongest argument in favor of preserving the non-reference rule in Illinois is that it protects the pleader from a careless court. For example, in the instant case the court ignored the plaintiff's contention that the credit item did not relate to the claim set forth in the first count.[15] This issue of fact might have received closer attention either at trial or on the pleadings if the defendant had been required to plead over to the first count. Moreover, although the Act expressly protects "alternative" allegations,[16] there is uncertainty in the scope of the term. Under the non-reference rule a pleader could gain added shelter from an undiscriminating court by stating his alternative allegations in separate counts.

An examination of the Act and Rules, however, indicates that the non-reference rule is obsolete, if not abolished, in the modern practice. Variance is not a

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is normally used to describe "mutually exclusive" statements of fact, theories of recovery, or prayers for relief. See Boyd v. New York & H. R. Co., 220 Fed. 174, 179 (D.C. N.Y., 1915); but see Hankin, Alternative and Hypothetical Pleadings, 33 Yale L.J. 365, 376 (1924).

[12] Buckley v. Mandel Bros., 333 Ill. 368, 164 N.E. 657 (1928) (judgment for plaintiff in negligence action reversed where declaration alleged that defendant's truck "ran into" decedent's motorcycle and proof at trial showed that decedent's motorcycle ran into defendant's truck).

[13] Stephen, op. cit. supra note 9, at 261; 9 Holdsworth, History of English Law 305 (1938).

[14] If the court decides that the "same" cause of action is involved, the prior adjudication will bar the later action on principles of res judicata; if the court decides that "different" causes of action are involved, the prior judgment will at least be conclusive on the issue of duress, under the collateral estoppel doctrine. See Barry v. The Commonwealth Edison Co., 374 Ill. 473, 29 N.E. 2d 1014 (1940).

[15] In support of this contention it should be noted that the amount of duplicate payment was alleged to be $1,456.00., whereas the credit was only for $596.69.

[16] Ill. Rev. Stat. (1947) c. 110, § 167 (2).

problem because there are liberal provisions for amendment to conform the pleadings to the proof.[17] Duplicity is no longer fatal.[18] Alternative allegations[19] and prayers for relief[20] are expressly protected by the Act. Many provisions of the Act and Rules give a reduced significance to the common-law conception of the "cause of action" and its pleading container, the count.[21] The inflated use of multiple counts is in disfavor.[22] Lastly, the Act expresses a definite policy of shortening trial litigation and eliminating pleading technicalities wherever possible, while continuing to do justice to all the interested parties.[23]

The abolition of the non-reference rule can benefit plaintiffs as well as defendants. A situation might arise in which a necessary averment has been inadvertently omitted from one count but is present in another.[24] To permit the trial or appellate court to supply the missing averment would work no prejudice of surprise to the defendant, and would be in line with the provisions of the Act which permit liberal amendment by the trial[25] and appellate courts,[26] and which hold that objections not made at the trial cannot be raised on appeal.[27]

PRESCRIPTIVE EASEMENTS IN ILLINOIS

The law relating to the establishment of easements by prescription generally requires the claimant of the easement to show that his use of another's land was open, exclusive, continuous and uninterrupted for the statutory period,

[17] Ibid., at § 170 (3).

[18] Wattman v. St. Luke's Hospital Ass'n., 314 Ill. App. 244, 41 N.E. 2d 314 (1942); Kovar v. Bremer, 281 Ill. App. 505 (1935), rev'd on other grounds 294 Ill. App. 225, 13 N.E. 2d 656 (1938).

[19] Ill. Rev. Stat. (1947) c. 110, § 167 (2).

[20] Ibid., at § 158.

[21] Ill. Rev. Stat. (1947) c. 110, § 148 (3) (alternative claims against different defendants permitted in the same or separate counts); ibid., at § 167 (2) (alternate statements of fact permitted in the same or separate counts); ibid., at §§ 259.10, 259.11 (certain equitable and legal matter permitted in one count or in separate counts); ibid., at § 259.12 (different breaches of the same duty "growing out of the same transaction, or based on the same set of facts" permitted in one count, as well as in separate counts).

[22] See Fisher, The Persistence of Chitty, 6 Univ. Chi. L. Rev. 359 (1939).

[23] Ill. Rev. Stat. (1947) c. 110, § 128 ("This Act shall be liberally construed, to the end that controversies may be speedily and finally determined according to the substantive rights of the parties. . . ."); ibid., at §§ 182a, 259.23a (pre-trial procedure); ibid., at §§ 181, 259.16 (summary judgments).

[24] Compare, Lake Shore & Michigan Southern Ry. v. Hessions, 150 Ill. 546, 37 N.E. 905 (1894), where an allegation of survival of widow and next of kin appearing in the seventh count was held to apply to the first six counts, which charged different items of negligence.

[25] Ill. Rev. Stat. (1947) c. 110 § 170.

[26] Ibid., at § 216 (a).

[27] Ibid., at § 166 (3).

and adverse to the servient landowner's interests.[1] Adverse use may be demonstrated by evidence that the claimant asserted a "claim of right" to maintain the use which was inconsistent with the property interests of the owner.[2] The burden of coming forward with such evidence generally falls upon the claimant;[3] his failure to present evidence of adverse use would be fatal to his case. Not infrequently, neither party offers sufficient evidence to establish the adverse or permissive nature of the use. Rather than allow the usual allocation of the burden of coming forward with evidence to work against the claimant, many courts have recognized a rebuttable presumption of adverse use if the claimant has satisfied the other prerequisites for the establishment of an easement by prescription.[4] A few courts, on the other hand, indulge in a presumption, also rebuttable, of permissive use.[5] For the parties involved, the consequences of the adoption of one of these presumptions in a jurisdiction may be considerable.[6] While most states have a well-settled rule as to which presumption, if any, will be applied, the Illinois decisions have not been consistent as to the quantum of proof necessary to establish adverse use. The recent case of *Poulos v. F. H. Hill Co.*,[7] however, crystallizes a definite trend toward adoption of the presumption of adverse use.

[1] Rest., Property §§ 457, 458, 459 (1944); 4 Tiffany, Real Property §§ 1195–97, 1199, 1201, 1202 (3d ed. 1939).

[2] 1 Thompson, Real Property § 419 (1939); 4 Tiffany, Real Property §§ 1196, 1197 (3d ed. 1939).

[3] 1 Jones, Evidence § 178 (4th ed. 1938).

[4] 1 Thompson, Real Property § 436 (1939); 4 Tiffany, Real Property § 1196a (3d ed. 1939).

[5] Speight v. Anderson, 226 N.C. 492, 39 S.E. 2d 371 (1946); Weber v. Gerber Holding Co., 138 N.J. Eq. 544, 49 A. 2d 300 (1946); Bowles v. Chapman, 180 Tenn. 321, 175 S.W. 2d 313 (1943); Northwest Cities Gas Co. v. Western Fuel Co., 13 Wash. 2d 75, 123 P. 2d 771 (1942); Gowen v. Swain, 90 N.H. 383, 10 A. 2d 249 (1939).

[6] When no presumption is recognized, the claimant must not only come forward with evidence of a claim of right but must assume the risk of nonpersuasion of the trier of facts. The defendant may succeed without producing contrary evidence if the claimant has not carried the burden of persuasion as to the facts claimed. The proponent of any fact must offer sufficient evidence of that fact so as to make it appear more likely than not that those facts are true.

When a presumption of adverse use is operative, the claimant may succeed without presenting any actual proof of adverse use if the landowner has not presented adequate rebuttal evidence. For the landowner to prevail, he must first overcome the presumption with actual proof in an amount and intensity which varies according to the rule of rebuttal adopted by the individual jurisdiction. See Morgan, Further Observations on Presumptions, 16 So. Calif. L. Rev. 245 (1943).

Sometimes evidence which is "credible" is sufficient to rebut; often "substantial evidence" is necessary, or evidence which makes the existence of the alleged fact more likely than its nonexistence, and occasionally "clear and convincing" proof is required to rebut a presumption. If there is a presumption of permissive use, the claimant likewise is required to produce actual evidence of adverse use sufficient to rebut the presumption. The claimant bears the burden of persuasion, which generally includes any evidential requirements of rebutting a presumption of permissive use. That is to say, once a claimant satisfactorily carries the burden of persuasion he will of necessity offer enough proof to rebut a presumption working against him. See note 11 infra.

[7] 401 Ill. 204, 81 N.E. 2d 854 (1948).

Early Illinois cases indicated that a claimant would not be aided by a presumption of adverse use but would be required to prove all elements necessary to the establishment of an easement by prescription.[8] Some Illinois decisions, moreover, appear to have placed a heavier burden upon the claimant than is ordinarily required of the party who bears the burden of persuasion.[9] These cases required the claimant to present sufficient evidence of adverse use to negative the possibility of the use having been permissive. This bordered on a requirement of clear and convincing proof of adverse use, a burden of persuasion more stringent than if the claimant were required simply to prove his case unaided by any presumption.[10] Whether the Illinois courts recognized a presumption of permissive use, which the claimant would have to rebut, was not particularly significant since the rather heavy burden of persuasion on the claimant would have engulfed any incidental requirement of rebutting such a presumption.[11] Where, however, the use originated in vacant, unoccupied, and unenclosed land, the Illinois cases have been uniform in asserting their adoption of the presumption of permissive use.[12] Only unfenced land with no structures upon it seems to be included in this category.

It was not until *Rush v. Collins*[13] that the Illinois Supreme Court started a definite trend toward adoption of the presumption of adverse use in instances where the use did not originate in vacant and unenclosed land.[14] In that case, the claimant proved all the elements necessary to establish a prescriptive easement, including some evidence of a claim of right and recognition of that right

[8] Parker v. Rosenberg, 317 Ill. 511, 148 N.E. 269 (1925); Bontz v. Stear, 285 Ill. 599, 121 N.E. 176 (1918); Illinois Central R. Co. v. Stewart, 265 Ill. 35, 106 N.E. 512 (1914). But see Warren v. Jacksonville, 15 Ill. 236 (1853).

[9] Waller v. Hildebrecht, 295 Ill. 116, 128 N.E. 807 (1920); Gilfoy v. Randall, 274 Ill. 128, 113 N.E. 88 (1916); Chicago, Burlington & Quincy R. Co. v. Ives, 202 Ill. 69, 66 N.E. 940 (1903); Rose v. City of Farmington, 196 Ill. 226, 63 N.E. 631 (1902).

[10] See 9 Wigmore, Evidence § 2498(3) (1940). Clear and convincing proof is often required in civil cases which involve fraud, undue influence, proof of contents of a will, proof of certain oral agreements, etc.

[11] Brown v. Henderson, 285 Mass. 192, 189 N.E. 41 (1934); Board of Water Commissioners of New London v. Robbins, 82 Conn. 623, 640, 74 Atl. 938, 945 (1910); Lisbon v. Lyman, 49 N.H. 553, 563 (1870); Morgan, Presumptions, 12 Wash. L. Rev. 255, 271 (1937). In Worth v. Worth, 48 Wyo. 441, 49 P. 2d 649 (1935) the court felt that the jury should be told of a presumption favoring the defendant although the plaintiff already had the burden of persuasion.

[12] Carter Oil Co. v. Welker, 24 F. Supp. 753 (Ill., 1938); Parker v. Rosenberg, 317 Ill. 511, 148 N.E. 269 (1925); Waller v. Hildebrecht, 295 Ill. 116, 128 N.E. 807 (1920); Illinois Central R. Co. v. Stewart, 265 Ill. 35, 106 N.E. 512 (1914).

[13] 366 Ill. 307, 8 N.E. 2d 659 (1937).

[14] In cases involving claims of easements for public ways there have been decisions recognizing a presumption of adverse use. Mudge v. Wagoner, 320 Ill. 357, 151 N.E. 276 (1926); Thorworth v. Scheets, 269 Ill. 573, 110 N.E. 42 (1915). However, there also exist cases requiring actual proof of a claim of right in this field. Gietl v. Smith, 320 Ill. 467, 151 N.E. 253 (1926) (decided the same day as Mudge v. Wagoner, supra); Doss v. Bunyan, 262 Ill. 101, 104 N.E. 153 (1914).

by the landowner. Although it recognized the sufficiency of this evidence of adverse use, the court chose to state further:

> Where a way has been used openly, uninterruptedly, continuously and exclusively for more than a period of twenty years, the origin of the way not being shown, there is a presumption of a right or grant from the long acquiescence of the party upon whose land the way is located. This presumption of a grant or adverse right is prima facie merely and may be rebutted. In the absence of evidence tending to show that such long-continued use of the way may be referred to a license or other special indulgence, which is either revocable or terminable, the conclusion is, that it has grown out of a grant by the owner of the land, and has been exercised under a title thus derived.[15]

To explain the reason for this presumption, the court added:

> The law favors this conclusion, because it will not presume any man's act to be illegal. It is also reasonable to suppose that the owner of the land would not have acquiesced in such enjoyment for so long a period, when it was his interest to have interrupted it, unless he felt conscious that the party enjoying it had a right and a title to it that could not be defeated. Because it can work no injustice to any one, except to him who has been guilty of great negligence, public policy and convenience require that this presumption should prevail in order to promote the public peace and quiet claims. . . .[16]

Although this language was not essential to the *Rush* decision, it now appears to embody the prevailing Illinois rule, having been cited with approval in all subsequent cases involving prescriptive easements in Illinois.[17]

In the principal case, *Poulos v. F. H. Hill Co.*,[18] the origin of the use upon

[15] 366 Ill. 307, 315, 8 N.E. 2d 659, 662–63 (1937).

[16] Ibid., at 315, 663.

[17] In Monroe v. Shrake, 376 Ill. 253, 33 N.E. 2d 459 (1941), the origin of the use was in vacant, unenclosed land and therefore presumptively permissive. The claimant's showing that he had maintained and repaired a roadway across the land was not considered sufficient to rebut the presumption. But referring to Rush v. Collins, 366 Ill. 307, 8 N.E. 2d 659 (1937), the court suggested that had the use originated in occupied land, a prima facie presumption of right or grant from the landowner's long acquiescence might well have been found. Similarly, in Lang v. Dupuis, 382 Ill. 101, 46 N.E. 2d 21 (1943), the court repeated the language of Rush v. Collins, supra, in regard to the presumption of adverse use, but did not apply it to the decision since proof of the existence of a license precluded a finding or a presumption of adverse use. In Leesch v. Krause, 393 Ill. 124, 65 N.E. 2d 370 (1946), the origin of a way across neighboring farm land was undetermined. Following the direction indicated in Monroe v. Shrake, supra, the court stated that it would presume a right or grant from the use of the pathway. There was evidence, however, that the claimant's predecessor had broken the lock of a gate preventing access to the way, and that the claimant had graveled the roadway with the landowner's knowledge. Utilizing the kind of evidence which, in the past had been insufficient to prove a claim of right, the tribunal was able to find an easement without relying upon the presumption of adverse use. The easing of the amount of proof required to sustain a claim of right may well be the direct consequence of the recognition of the presumption of adverse use. The presumption plus some evidence makes for a strong case in the absence of substantial rebuttal evidence.

[18] 401 Ill. 204, 81 N.E. 2d 854 (1948).

improved urban property was unexplained, giving rise under the doctrine of the *Rush* case, to a presumption of right upon showing of open, continuous use.[19] Although this presumption was acknowledged, there was also convincing proof of a claim of right: namely, the servient owner's compliance with the claimant's orders to remove all objects which would interfere with enjoyment of the use. As is generally the case, the court preferred to rely upon some actual evidence of the presumed fact, in conjunction with the presumption, rather than utilize the presumption alone in order to find that fact. Consequently, in no case of record in Illinois has a naked presumption of adverse use been employed to satisfy the requirement of a showing of a claim of right. But the language of the Rush case appears to have been accepted by the court. Should a case arise in which there is no evidence of a claim of right, the presumption of adverse use would undoubtedly be sufficient to satisfy the claimant's burden in the absence of adequate rebuttal evidence.

The amount of evidence required to rebut a presumption of adverse use has not yet been determined by the court. Illinois cases dealing with rebuttal of other presumptions of fact have held, generally, that upon introduction of evidence contrary to the presumption, which if believed would justify a finding against the presumption, the presumption vanishes and all the evidence goes to the trier of facts for consideration.[20] Thus the Illinois courts appear to follow the Thayer-Wigmore view of rebuttal which is most lenient towards the party opposing the presumption.[21]

The Illinois view that there is a presumption of adverse use where all the other elements necessary for an easement by prescription are shown and where the origin of the use is not in vacant, unenclosed land, is the majority rule.[22] Underlying this rule is the assumption that no man will allow another to enjoy an easement in his land if he can help it, since an easement is a detrimental burden upon the land. Consequently, if one man does make such use of another's property, the lack of objection on the owner's part can be attributed to the owner's inability to defeat the claim or to his own neglect.[23] Because of procedural difficulties in the common law, earlier courts had employed the

[19] For a discussion of the advisability of applying the presumption of permissive use originating on vacant, unenclosed, unoccupied land to urban property, see Shepard v. Gilbert, 212 Wis. 1, 249 N.W. 54 (1922) and Presumption as to Adverse Character of User of Way over Unenclosed Urban Land, 19 Corn. L.Q. 337 (1934).

[20] Osborne v. Osborne, 325 Ill. 229, 156 N.E. 306 (1927); Sheldon v. Brandstetter, 325 Ill. App. 595, 60 N.E. 2d 576 (1945); Nielson v. Pyles, 222 Ill. App. 574, 54 N.E. 2d 753 (1944).

[21] 9 Wigmore, Evidence § 2491(3) (1940); Morgan, Further Observations on Presumptions, 16 So. Calif. L. Rev. 245, 247 (1943).

[22] 1 Thompson, Real Property § 436 (1939); 4 Tiffany, Real Property § 1196a (3d ed. 1939). For a collection of cases in each jurisdiction, see annotation 170 A.L.R. 776 (1947).

[23] Rush v. Collins, 366 Ill. 307, 315, 8 N.E. 2d 659, 662 (1937).

fiction of a lost grant to justify finding an easement. This fiction has generally been discarded as a result of modern possibilities for establishing easements by application of the statute of limitations which designates the prescriptive period.[24]

The rationale behind the majority rule may not always represent the realities of modern society, but the effect is not undesirable. It places a reasonable time limit on the landowner's right to protest against a use, origin of which is not determined. After a lengthy period of maintaining the use, the dominant owner should be given assurance that he may continue his usual practice without disturbance. Application of the statute of limitations and the presumption of adverse use accomplishes this end.

In *Poulos v. F. H. Hill Co.*[25] the plaintiff-owner of a vacant lot in Chicago desired to improve his property by constructing a three-story building. This construction would have been interfered with by a fire escape attached to an adjoining seven-story building owned by the defendant. The fire escape extended two and one-half feet over the plaintiff's land, was about twenty feet long, and ran from the top of the building to a point twenty feet above the ground where there was an attached hinged ladder which could be lowered onto the plaintiff's land below. This encroachment originated in 1914 when the plaintiff's lot was improved with buildings long since razed. Although the fire escape had never been used, objects placed beneath it had been removed upon complaint of the defendant's manager. In a suit to compel removal of the fire escape, the defendant claimed that an easement had been acquired by prescription giving him both the right to maintain the fire escape and the right to use an unencumbered area below for lowering the ladder. The trial court recognized an easement to maintain the overhanging fire escape, but restricted the prescriptive right to the fire escape's unlowered level, twenty feet above the adjoining property. On appeal, the Illinois Supreme Court, after discussing the presumption of adverse use, found an easement to maintain the overhanging structure

[24] The early English statute of limitations for establishing title by adverse possession was not applied to easements because it was held that incorporeal heraditaments could be gained only by grant. Therefore the courts invented the "lost grant" which became an irrebuttable presumption upon proof of the operative facts. This presumption of a lost grant of easemens was adopted by American courts, and many of them still speak in terms of this fiction. Others, recognizing that an easement may be established by prescription without need of a grant, have discarded the fiction for a simple application of the statute of limitations. Where there it no statute specifically prescribing a prescriptive period for easements, as in Illinois, the statutory period which applies to adverse possession is also applied to prescriptive easements. Those courts indulging in a presumption of adverse use upon a showing of the other elements necessary to establish an easement by prescription, sometimes speak of a presumed grant or title to justify the presumption of adverse use itself. This seems an unnecessary application of the ancient reasoning to allow finding one of the elements of an easement rather than the easement itself. In regard to the evolution of prescriptive easements and related presumptions, see Cheshire, Modern Law of Real Property, 254–67 (5th ed. 1944); 7 Holdsworth, History of English Law 343–52 (1926); 4 Tiffany, Real Property § 1191 (3d ed. 1939).

[25] 401 Ill. 204, 81 N.E. 2d 854 (1948).

and to use that portion of the space and ground immediately below where the hinged ladder would descend.

Recognition of an easement to maintain an overhanging structure, in the present case, establishes precedent on a point of law which had not previously arisen in Illinois.[26] The result is in accord with decisions in other jurisdictions that such a right may accrue to the owner of an object which protrudes over, but does not touch the adjoining land. A common example is the extension of eaves or of cornices of a roof.[27] Other possibilities are window shutters,[28] awnings,[29] signs, flag poles, wires and antennae. Easements to continue an underground encroachment also have been recognized,[30] but overhanging shrubbery or limbs of trees have failed to give rise to an easement.[31]

After finding an easement to maintain an overhanging structure, the court in the instant case was confronted with the further problem of ruling as to the claimant's right to use the surface of the land beneath the protrusion. This problem perhaps could have been solved by interpretation of the general rule that one who has an easement created by prescription also has the privilege of doing such acts as are necessary to make effective the enjoyment thereof, unless the burden upon the servient land is thereby unreasonably increased.[32] Since most easements gained by prescription are rights of way, the scope of the additional use is usually limited to the making of repairs and improvements and to increasing the use of the way. By analogy, the owner of a protruding structure who has a prescriptive right to maintain it, may enter upon the servient land to make repairs and improvements. The servient landowner has the privilege of using his property in any way not incompatible with the use

[26] In Jobst v. Mayer, 327 Ill. 423, 158 N.E. 745 (1927) and Finch v. Theiss, 267 Ill. 65, 107 N.E. 898 (1915), the Illinois Supreme Court enjoined the maintenance of fire escapes extending over private ways. Had these encumbrances been maintained for twenty years, the dominant owners might have acquired easements by prescription.

[27] Romans v. Nadler, 217 Minn. 174, 14 N.W. 2d 482 (1944) (eaves and dripping gutters); J. C. Vereen & Sons v. Houser, 123 Fla. 641. 167 So. 45 (1936) (protruding eaves); Matthys v. First Swedish Baptist Church, 223 Mass. 544, 112 N.E. 228 (1916) (extending roof); Sorkin v. Sentman, 162 Pa. 543, 29 Atl. 722 (1894) (attic protruding over adjoining property); Grace M. E. Church v. Dobbins, 153 Pa. 294, 25 Atl. 1120 (1893) (overhanging cornice).

[28] Homewood Realty Corp. v. Safe Deposit & Trust Co., 160 Md. 457, 154 Atl. 58 (1931).

[29] In Jobst v. Mayer, 327 Ill. 423, 158 N.E. 745 (1927), maintenance of an awning protruding over complainant's private way was enjoined. If it had been maintained for the prescriptive period, an easement could have been established.

[30] Sorkin v. Sentman, 162 Pa. 543, 29 Atl. 722 (1894) (cellar beneath surface of adjoining land); Bass v. Gregory, 25 Q.B.D. 481 (1890) (airshaft through adjoining building beneath the surface); Koenigs v. Jung, 73 Wis. 178, 40 N.W. 801 (1888) (underground vault).

[31] Robinson v. Clapp, 65 Conn. 365, 32 Atl. 939 (1895); Lemmon v. Webb, [1894] 3 Ch. 1. In the case of old trees which do not continue to grow but maintain the same position in relation to the servient land for the prescriptive period, under a claim of right and with servient landowner's acquiescence, a contrary result would seem likely.

[32] Rest., Property § 480 (1944); 1 Thompson, Real Property §§ 449, 450 (1939).

authorized by the easement.[33] Therefore, where the dominant owner has the right to maintain an overhanging structure, the right of the servient owner to build upon the land below the protrusion depends upon the necessity of free access to that land by the dominant owner for maintenance and enjoyment of the easement.[34]

The court in the *Poulos* case held that the right to maintain a use for a particular purpose must carry with it all the peculiar uses inseparably related to effective enjoyment of the easement.[35] Maintenance of an unencumbered area beneath the fire escape in this case was so related, even though there had been no previous occasion for the use of the fire escape and therefore no reason to enter upon the ground beneath. Denial of the owner's right to construct a building beneath the protrusion was thus recommended by the practical necessities of the situation. Recognizing an easement but permitting it to be rendered useless—the import of the lower court's decision—would have been a futile gesture.

All easements, including an easement to maintain an overhanging structure, represent a right in the servient land. The court in the present case seemed to imply that maintenance of a fire escape with a hinged ladder so located was in effect a use of the surface below as well as the space actually occupied. If that is so, the potentiality of the use thus *was* a use, and therefore the "potentiality" should be guaranteed by prescription as well as the continued maintenance of the encroaching structure. The decision thus introduces a new concept of the type of use which may ripen into an easement by prescription. Future application of this concept, however, will probably be restricted to closely similar situations where failure to recognize the right to the complementary use would render the easement valueless.

[33] Doan v. Allgood, 310 Ill. 381, 141 N.E. 779 (1923); Finch v. Theiss, 267 Ill. 65, 107 N.E 898 (1915); Rest., Property §481 (1944).

[34] In Dunbar v. O'Brien, 117 Neb. 245, 220 N.W. 278 (1928), the claimant acquired the right to enter upon a vacant strip of land on the adjoining property beneath claimant's overhanging eaves for the purpose of painting his house, washing windows and making repairs. The easement extended beyond the area covered by the eaves because of the necessity of having room to place ladders. But in Romans v. Nadler, 217 Minn. 174, 14 N.W. 2d 482 (1944), a similar claim failed because the plaintiff did not enter upon the adjoining land to make repairs more often than every six years. In the cases cited, the prescriptive right to enter upon another's land beneath claimant's overhanging structure was based upon periodic entry for the purpose of maintaining or repairing the easement property. In the absence of such entry to the land beneath the fire escape, in the Poulos case, the right to an easement in such land had to be determined on other grounds.

[35] Whether the claimant in the Poulos case had the right to ingress and egress across the servient land to the spot where the escape ladder would rest when lowered was not determined because the question was not raised in the pleadings. The principle announced, however, would seem likely to extend the easement that far.

BOOK REVIEWS

The Basing-point System. By Fritz Machlup. Philadelphia: Blakiston Co., 1949. Pp. vii, 275. $5.00.

The Supreme Court of the United States in deciding *Federal Trade Commission v. The Cement Institute, et al.*[1] found that the pricing system utilized in the cement industry was unlawful. Under this system, called a basing-point system, the delivered price of a product at any destination is so calculated as to be identical no matter where the product is produced or from what point it is shipped. The calculations are simple. Published and readily available transportation charges are added to published posted prices for selected base points (usually but not necessarily major producing centers); the lowest combination of the two factors—base price and transportation price from a base—is then the delivered price, quoted by all the participants in a basing-point system.

Since the passage of the Sherman Act in 1890, agreements, understandings or arrangements to fix prices have come to be illegal in the United States. Yet basing-point systems have continued to be widely used in this country for approximately fifty years. Not until 1948 did a majority of the Supreme Court explicitly find an industry-wide basing-point system illegal. At that time Mr. Justice Black held that use by competitors of a uniform pricing formula, with knowledge that concerted action was contemplated and invited, constitutes a combination to fix prices.[2] Essentially that is the cement case.[3]

The reverberations of the decision are still being felt. The Senate of the United States has held extensive hearings,[4] trade publications, commercial papers, and professional journals are filled with analyses and speculations about "delivered pricing," "meeting competition," "candy bars that sell for a nickel the country over," "the danger of ghost towns" and "usurpation of the legislative function by the courts." Professor Fritz Machlup has published the first full-length book on the subject of the basing-point system since the cement case.

In his timely book Professor Machlup has put the basing-point system on trial. In Machlup's "economic court" the ruling of the Supreme Court is both confirmed and extended. The complaint before "Judge Machlup" contains six broad counts—price fixing, price discrimination, wastes of distribution, concentration of control,

[1] Federal Trade Commission v. Cement Institute, et al., 333 U.S. 683 (1948).

[2] Ibid.

[3] Much of the furor about the Cement case arises from Justice Black's comments concerning producers as individuals (i.e., not in concert) with respect to price discrimination. This involves departures from competition not covered by Section 1 of the Sherman Act. It should be emphasized that it is *not* necessary that Section 5 of the Federal Trade Commission Act have any broader scope than Section 1 of the Sherman Act to outlaw an industry-wide basing-point system.

[4] Study of Pricing Methods, Hearings before a Senate Subcommittee of the Committee on Interstate and Foreign Commerce on S.R. 241, 80th Cong. 2d Sess. (1948).

retardation of growth, and distortion in location of capacity. He finds the defendant, the basing-point system, guilty on all six counts. On the basis of his findings Professor Machlup decrees that equitable relief is afforded by requiring participants in the system so to price their products that the net returns to any mill on all sales of like products made at the same time are uniform. In other words, his decree requires that there shall be compulsory uniform f.o.b. pricing.

"The bulk of this book," says Professor Machlup, "is devoted to the economic analysis of the basing-point system."[5] And on the following page, "To relate the various facts and understand the significance of their interrelationships we must rely on a logical analysis of the system in all its ramifications."

Unfortunately these commendable objectives are not realized. A "logical analysis of the system" by an economist might be expected to throw some light on the question why and under what circumstances a basing-point system rather than some alternative form of price cartel[6] is adopted. Such analysis is conspicuously absent. Chapter 4, The Monopolistic Nature of Basing-point Pricing, points up significant departures from competitive behavior. It does not afford so much as a clue to the essential differences between a basing-point system and other departures from competition. In fact, the case that is made in this chapter does not vary greatly from the government's position in the *Cement* case, although Machlup uses more care in distinguishing the case of the single monopolist from the price cartel. Machlup's finding that the basing-point system is "collusive" rests heavily on the kind of evidence which lawyers traditionally present to courts in anti-trust cases: thus on page 135, "correspondence ... between officers of companies in industries using the basing-point system ... referred to base price and extras to be charged," and "oligopoly positions were shown to have resulted from corporate mergers"; and on page 128, "Bitter complaints were directed to trade associations if a competitor by mistake or otherwise failed to use the published freight factor in calculating the delivered price and, thus, quoted a lower price"; or on page 126, "the open price association is, as the Supreme Court once said, 'simply an expansion of the gentlemen's agreement of former days, skillfully devised to evade the law and 'to procure ... concerted action.' "

It may well be, as the author points out, that "[l]egal minds sometimes show an astounding slowness in grasping economic arguments."[7] Perhaps this would be less so if they received more economics and less legal reasoning from economists. Machlup's case that basing-point systems are "price-fixing" arrangements principally involves a lawyer-like demolition of the arguments of basing-point advocates.

"Attempting to prove a basing-point system 'competitive' is trying to prove what can't be proved," says Machlup. Either through "hypocrisy" or "sincere ignorance" mutually inconsistent positions are taken, according to the author. Essentially these are:

1) The identity of delivered prices is evidence of effective competition, because competition must result in price uniformity.[8]

[5] P. 51.

[6] The pricing practice involved in the use of an industry-wide basing-point system is characterized by Machlup as a price cartel (page 18).

[7] P. 91.

[8] Mutual inconsistency of the statements is mild criticism indeed of such argument. If cats have tails, is a dog a cat because it has a tail?

2) The system is a method of increasing competition through interpenetration of regional markets which without the system would become domains of local monopolies.

3) The system brings more order into markets, but does not eliminate or reduce competition, which continues to operate effectively (a) through adding bases and changing prices at existing basing points, and (b) through selling at prices deviating from the rules.

4) The system has reduced the degree of competition, but it is the result of the natural evolution of competitive forces under the economic conditions prevailing in certain industries, and a prohibition of the system could not increase the degree of competition effective in these industries.

Professor Machlup analyzes the arguments with thoroughness and patience. On page 96 seven reasons are listed why delivered price uniformity of the basing-point system is not evidence of competition. The argument that intermarket penetration is evidence of competition is disposed of by showing that no pecuniary benefits accrue to consumers.[9] The local monopoly prices alleged to derive from f.o.b. pricing are then shown to be lower than those which would be charged under the basing-point system.[10]

Unlike points 1 and 2 above, points 3 and 4, according to Professor Machlup, are based on valid theorizing and their significance has to be tested by factual evidence. The evidence is found wanting.

Prices under the system, it is said, are not lower at new basing points even though "[a] producer does not realize his freight advantage by charging a high price at which he can sell very little, where he could sell a great deal more at a somewhat lower price."[11] Machlup believes the price would not be lowered with a basing-point system "guided by financially powerful firms," because they can easily afford to keep up and even increase their shipments into the territory of the new base mill since they need not lower prices in other territory. Does this conclusion derive from the basing-point system or from the existence of "financially powerful firms"? Essentially this is an argument against discrimination and provides the principal argument for compulsory uniform f.o.b. pricing. Machlup does not establish that there is anything inherent in the use of a basing-point system which prevents either an increase in the number of basing points or changes in base prices if such course of action should prove to be beneficial to the participants. How did it come about that Luken Steel and Worth Steel at Coatesville, Pennsylvania, and Claymont, Delaware were basing points for steel plates, or that Granite City, Illinois was a basing point for tin-plate? It is not unknown in cartel practice for concessions to be made to small producers in order to carry out the purposes of the organization.[12] If the basing-point system is a collusive price-fixing device, is it not immaterial whether prices can be lowered a little under the system so long as they are fixed by concert to avoid competitive levels?

Considerable space is given by Professor Machlup to point 4, the natural evolution point. Inasmuch as he takes pains to distinguish basing-point pricing practice

[9] P. 100. A qualification on page 103, however, states that in certain situations market interpenetration may promote competition.

[10] P. 104.

[11] P. 112.

[12] Elsewhere Machlup quotes Professor Fetter with approval: "[A]ccomplices may be in a measure victims, and fear may be mingled with rewards to enforce cooperation." P. 133.

from less formalized open-pricing or price leadership examples, an impression is created that equally noncompetitive results are possibly less "collusive" than when less direct means and methods are utilized. The space given to this kind of argument hardly seems consistent with the approval with which Machlup quotes the Supreme Court in the *Masonite* case on this very point: "The fixing of prices by one member of a group, pursuant to express delegation, acquiescence, or understanding, is just as illegal as fixing prices by direct joint action."[13] Similarly, he quotes the *Cement Institute* case: "It is enough to warrant a finding of a combination within the meaning of the Sherman Act, if there is evidence that persons, with knowledge that concerted action was contemplated and invited, give adherence to and then participate in a scheme."[14]

The author concludes, "The courts have now seen the truth." But the truth the courts see need not rest on the overt actions which Machlup details. For even if other systems are devised which do not fit the means or methods tests which Machlup outlines, or even if the basing-point system can be shown to be a much more logical collusive device for maximizing gains than it appears to be under Machlup's description (and therefore, perhaps, more susceptible to the leadership principle) does not the conclusion still follow that there is "collusion," not only in the legal sense but also in the economic sense which Professor Machlup gives the term?[15] In any event, there is small and declining impartial dissent from the proposition that a basing-point system is a price-controlling device. Machlup concludes as did the Supreme Court, and as did Professor Frank A. Fetter long before either, that a basing-point system "is in restraint of trade," "is a price cartel," or "is a masquarade of monopoly." The elegance of the variation should not hide the uniformity of the economic conclusion.

For those who, like Machlup, believe "that a truly competitive order . . . [is] the most efficient mechanism for the allocation of resources . . ." the case against the basing-point system (or any other pricing system) should be conclusive upon showing of collusion without resort to proof of the additional points in his indictment—that is, price discrimination, waste of distribution, concentration of control, retardation of growth, and distortion of location of capacity. Much of the findings with respect to these latter charges rest not only on facts which are in dispute but also upon assumptions the credibility of which for collusive purposes is subject to considerable doubt. They seem to have achieved a status of authority in no small part due to the frequency of their repetition, not only as a part of the specious and conflicting claims of basing-point advocates, but also in statements of the students of the problem who could safely be characterized as "disinterested." A specific reference is "cross-hauling."

Intermarket penetration (cross-hauling) has long been said to characterise the basing-point system. Machlup accepts cross-hauling as a fact almost without reservation. But he does not cite reliable empirical evidence that true cross-hauling is quantitatively important; indeed, he points out that there is a dearth of reliable information on the extent of true cross-hauling. In the absence of direct evidence it might be reasonable to suppose extensive cross-hauling to exist if it could be shown

[13] United States v. Masonite Corporation, 316 U.S. 265, 276 (1942).

[14] Federal Trade Commission v. Cement Institute, et al., 333 U.S. 683, 716 (1948).

[15] That is, "collusive" not only as a mere or minor departure from theoretical or pure competition, but as a significant departure from the effective competition which could otherwise be achieved.

that sellers characterized by Machlup as "cartelists," would benefit thereby. Yet Professor Machlup argues that cross-hauling is irrational for both monopolists and cartelists. On page 94, for example: "A single monopolist would *not* use a basing-point system for his plants"; and for a group of sellers, on page 102: "The end-effect is that as a group producers gain no business at all. Each of them finds his mill net price reduced, the reduction being due *entirely to higher selling costs and freight involved* in the *increased cross-hauling*, i.e., in the increased intermarket penetration."[16] The little firms are oppressed by the system, but don't cry out in protest from ignorance. "First of all, most of them do not understand the situation."[17] Under these circumstances, it is hard to understand Machlup's acceptance of cross-hauling, except as evidence of the power of reiteration. This question is significant, not only for its implication about the depth of his analysis, but even more because many of Machlup's charges about concentration of control, or mal-location of capacity, for example, would require modification if it were established that cross-hauling was insignificant.

A particularly flagrant example of Machlup's acceptance as realistic of highly irrational behavior by "cartelists" is provided on page 161, an example which is designed to show that the power of the large firm to oppress the small under the basing-point system is due neither to technological inferiority and high production cost of the small mill nor to the small mill's not being a basing point. Machlup's conclusion that the small producer is oppressed by the larger rests squarely upon the continuance of a practice against the interests of both participants. The assumptions of Machlup's illustration are as follows:

1) Eighteen consuming points (A to R) each consume 200 units daily. All are located on the same railway and the freight rate from any one point to the next is $3. The long-haul rate is the sum of the short-haul rates.

2) This market is supplied by two producers, one at D, the other at I. Both mills have the same unit costs when capacities are utilized to the same extent.

3) Of the total supply for the 18 consuming points (18 × 200 units per day, 3600 units) the mill at D supplies 1200 units, the mill at I 2400 units, each at an average production cost of $47 per unit at those outputs. Both mills operate under constant average variable costs and under decreasing average total unit costs.

4) Both mills are basing points. Base price at each point is $50. Delivered prices exceed base prices by the amount of the freight rate from the nearest basing point.

Under these assumptions it is immaterial (pricewise) to any consumer from which supplier he purchases. It is not immaterial, however, to either supplier to which consumers he sells. The following table shows clearly that under the above assumptions, returns for mills at both D and I are maximized only when the mill at D serves consumers at A, B, C. D, E, and F, and the mill at I serves all others. Then and only then are mill net returns for both mills maximized at $50 on all sales (see table).

If both mills serve their "natural"[18] markets (and maximize their returns under the assumptions given) mill D will be selling 1200 units per day, receiving a mill net of $50 each, or $60,000. Total cost is $47 per unit, or $56,400, and a net profit of $3 per unit provides $3,600. The will at I will be operating at the same unit rate with twice the sales or $120,000, at a cost of $112,800 and a net profit of $7200.

[16] Italics added. [17] P. 168 n.

[18] The markets in which a mill has a comparative cost advantage.

So far there has been no departure from Machlup's own example. Machlup now assumes that the mill at I will attempt to expand sales into D's (the small mill) territory. Mill I succeeds in taking half of the business at consuming points E and F. Presumably the mill at I has excess capacity so that the initial action, at least, does not necessitate a patently absurd assumption like trading $10 bills for $5's. In any event, it costs Mill I $1200 more ($3 × 100 at F plus $9 × 100 at E) to handle this business than it would mill D. But notice what follows: Machlup says, *"The mill at D will now try to make up for the lost volume by sales to customers at G and H."*

Assuming at this point, as Machlup does, that the mill at D gets half the business at G and H, it is supplying these new customers at a cost $1200 per day higher than the mill at I. Machlup's ingenious cartelists are now donating $2400 daily, something more than 20 per cent of their prior combined profits, to the railroad. Are they satisfied? Indeed not! The mill at I does not even attempt to take additional business at

(IN UNIT SALES)

Sales to Consuming Point	Governing Basing Point	Freight Rate from D	Freight Rate from I	Mill Net to D	Mill Net to I	Advantage
A B C or D....	D	$9 $6 $3 or $0	$23 $21 $18 $15	$50	$35	To D $15
E.....	D	$3	$12	50	41	To D $ 9
F.....	D	6	9	50	47	To D $ 3
G.....	I	9	6	47	50	To I $ 3
H.....	I	12	3	41	50	To I $ 9
I J K... R...	I	$15 $18 $21 ... $42	$0, $3 $6 ... $27	35	50	To I $15

F and E, where its relative disadvantage is but $3 and $9, but moves into territory A... D where its disadvantage is $15 per unit. And D, surprisingly enough, retaliates by taking a like share of I... R at a similar disadvantage. Rigid adherence to this system of self-inflicted punishment, involving equally matched losses, obviously exhausts the smaller revenues of the small mill before it does the larger. Thus "the large concern can dominate the smaller competitor on account of size alone."

Suppose, however, that the smaller mill can somehow be endowed with a modicum of enlightened self-interest. Why cannot the mill at D be expected to exercise its retaliation where it has a cost advantage? It is clear that if the mill at D retaliates a move by the mill I to take customers at F, E or A... D in those same areas, then at any price a cost advantage of $3, $9 or $15 per unit respectively can be exerted over the mill at I. In this event the mill at I would drive itself to the wall, not mill D. Moreover, the folly of the plant at I attempting to secure business in D's natural area (or for that matter D in I's territory), if rational behavior can be expected, seems apparent even in the absence of overt agreement. As a basic feature of a cartel agreement (basing-point system?) it enters the realm of cuckooland.

This same kind of dilemma (the apparent folly of the system) arises not only in the case of domination due to size, but also in the other cases the explanation of which depends upon cross-hauling. Must cross-hauling be considered an essential part of the system, especially since, as is generally agreed, the confirming empirical evidence is so unsatisfactory? One economist, at least, has seriously questioned its importance.

Professor George Stigler of Columbia University is currently working on an explanation of a basing-point cartel which does not depend upon irrational behavior.[19] He has suggested that the system is rational as a form for "price collusion" where production is widely dispersed, where demand is geographically unstable,[20] where sizable storage of product is impracticable, and where transportation cost is a major component of delivered price. It is generally recognized that price-fixing schemes are most workable when prices can be stabilized over substantial periods of time. "Price chiseling" can then be more easily detected and properly provided for. If a price-fixing scheme must depend upon wide and frequent variations in price the problems of adherence and compliance often become insuperable. The need of this stability by a price cartel, according to Professor Stigler, coupled with geographically unstable demand gives rise to the need for delivered pricing schemes (of which the basing-point system is an example). Without geographically unstable demand an f.o.b. price agreement with territorial division would seem to be a more effective pricing arrangement than a delivered pricing scheme, and it would not require substantial shipments from far away producers to markets more economically served by adjacent producers. But an f.o.b. scheme without this geographic stability would be effective only as the diversely situated suppliers varied their prices significantly as demand shifted in order to maximize returns.

If, unlike the previous example (illustrated by the table on page 9), the demand were not assumed to be geographically stable, but rather in one month concentrated in the natural market of a mill situated as the one at D, and in another month in the territory of the mill such as the one at I, then in the absence of the basing-point system, the mill located at D would rationally raise its prices when demand concentrated in its area. The mill at I would participate insofar as the D mill could not handle the additional business. A similar result would follow when demand was concentrated in the natural market of the mill at I, with the mill at I having the advantage. This kind of price adjustment, says Stigler, is obviated by a basing-point system. Base prices are established which define the "natural" markets for the participating firms, located for example in the foregoing table for mills A and D.[21] As demand shifts from D's territory to I's territory then and only then will mill D indulge in so-called "freight absorption," and even then penetration is limited by the increasing cost of going too far into I's market. It is important to note, though, that mill I will not at the same time be making substantial sales in D's territory.[22] Substantial cross-haul is excluded.

[19] At the time this review was written, Professor Stigler had not published his analysis of the basing-point system. What is herein referred to as "Stigler's theory" results from this reviewer's interpretation of his position as presented in a roundtable session at the University of Chicago. Consequently, any errors or omissions are the responsibility of this reviewer. Essentially, however, Stigler is to be credited with rationalizing delivered-pricing by correlating it with geographically unstable demand conditions.

[20] Also conceivable under conditions of geographic fluctuations in supply: for example, production affected by weather changes.

[21] Strictly, the hypothetical limitations imposed in the Machlup example do not provide an apt situation for a good "Stigler case." The assumed price and cost conditions in this particular example preclude substantial penetration of mill D's market by mill I, or mill I's market by mill D irrespective of geographic shifts in demand, because marginal costs for either mill will exceed delivered-price after only limited penetration.

[22] Minor exceptions for time lags or the cost of moving salesmen are recognized.

In summary the basing-point system has rational advantages under certain assumed conditions. It allows for stability of price, making unnecessary numerous price changes; it allows mills to concentrate on the most profitable business, placing penalties in the form of transportation costs on business uneconomically supplied, and thereby substantially eliminates wasteful cross-haul; and it minimizes the necessity of wide fluctuations in output of various mills in the absence of price change.

The extent of the empirical evidence to support the assumed demand characteristics which Stigler ascribes to basing-point industries must await further study. Readily available examples should be expected, however, especially in the industries supplying building and construction. Professor Machlup has a partial list of products sold in conformance with basing-point systems on page 17. Of these, cement, rigid steel conduit, soil pipe, structural steel, oak flooring, and other lumber products might be expected to fall into an unstable demand group. On the other hand, such products as sugar, glucose, corn syrup, and certain steel products as tin plate and automotive sheets probably exhibit much less variation in regional demand.

There may well be rational explanations for inclusion in a list like Professor Machlup's of products that are not subject to large regional variations in demand. The existence of anti-trust laws in the United States and the earlier court decisions under them at least made the legality of basing-point systems much less subject to doubt than less camouflaged price-fixing schemes. If the system provided a haven for cartel minded oligopolists then it is probable that the form of the system might have been adopted even though in actual practice pricing closely approximates what would occur under an f.o.b. price agreement. (When production is concentrated in a small area, a basing-point agreement involves no substantial cross-haul irrespective of the geographic characteristics of demand.) The production of both hardwood flooring, and plywood, although included as basing-point examples, is geographically concentrated. (An interesting test of this speculation about the form of the agreement would involve contrasting pricing forms in this country with those for similar products abroad where no anti-trust laws exist.)

The contrast between the more traditional description of basing-point systems involving extensive cross-hauling adopted by Professor Machlup and the "rational cartel" model portrayed by Professor Stigler has interesting implications concerning the much discussed subject of uneconomic location of productive facilities due to basing-point practice. Machlup points out, "In general the most economic locations for the installation of productive capacity for a particular product are those at which the sum of 'procurement cost,' 'processing cost,' and 'distribution cost' is least." He might have added that this generalization is equally true of competition, oligopoly, or monopoly. The theory of mal-location under the basing-point system, apart from the not insignificant effect of any departure from competition in eliminating an automatic mistake corrector, arises because of the irrationality of the distribution pattern. As Machlup says on page 233, "The mere fact that the basing-point system has important effects upon *distribution cost* suggests that it also may have effects upon the location of productive capacity in the industries that have practiced this system as well as in the industries that have used the products sold under the system."

But what becomes of this conclusion if it is assumed that the system has minor or insignificant effects upon the distribution costs of the producers? Certainly rational producers do not locate their plants just anywhere because they can to some degree

fix prices. The reasons Machlup gives for expecting mal-location rest on statements of previous writers on the problem, including Professors Arthur R. Burns, Frank A. Fetter, Edgar M. Hoover, and Melvin de Chazeau. At most, their statements suggest possible delays in economic adjustment of the kind that might arise from any cartel-like departure from competition; they do not point to any mal-location attributable specifically to the use of a basing-point pricing system. Both Professor Machlup's analysis and his historical data seem singularly unconvincing, especially since not a single reason is listed which explains *why* any producer would locate a plant differently when he is a participant in a basing-point system from when he is a vigorous competitor.

Does the location of the purchasers of the products sold under the basing-point system present a case for uneconomic location? Prices to fabricators or consumers will certainly be different under the "basing-point cartel" from pricing in its absence. But it is not enough to establish that prices are generally higher. Mal-location could arise only from geographic discrimination.[23] Geographic discrimination is certainly characteristic of basing-point systems described by both Stigler and Machlup, as has been previously indicated. But is this discrimination consistently in favor of particular locations? If there were persistent discrimination in favor of one area it would be reasonable to expect that this might lead to the establishment of users or fabricators which the elimination of the system would displace. But the very reason for Stigler's rational basing-point system is *changing* geographic demand. No particular location under this hypothesis has to be favored in such manner as to change the economies of plant location by customers. This is apparent when principal producing areas are basing points, if it can be assumed that changing from base prices to f.o.b. prices does not involve greater relative charge at one base than at another averaged over a span of time long enough to account for shifts in demand. But it has already been indicated that the producer participants can be properly and rationally located under the system. If a switch to f.o.b. pricing makes for relatively greater price change for one producer than another it merely signifies that the basing-point prices were not rationally adjusted in the first place. It is not required that prices at all bases be uniform under a basing-point system.

A case of retarded industrial expansion is usually made for areas not contiguous to basing points. Professor Machlup, for example, quotes Professor de Chazeau with approval that the system "would obstruct the extensive development of capacity for tonnage steel at locations other than those contiguous to basing-points."[24] And Machlup's own theoretical conclusion is "that the basing-point system in general tends to retard the decentralization of the industry in which it is employed."[25] And from this "it follows logically that the fabricating industry had an incentive to locate close to the large and old centers of supply [basing-points?] rather than near the peripheral supplies and markets."[26] But Professor Machlup goes on to point out that "this is no less true under a uniform f.o.b. mill pricing system than under the basing-point system." "The distinctive influence of the basing-point system upon the location of fabricators," he says, "results (1) from the retardation or prevention of the establishment of a local source of supply under the system, and (2) from the maintenance of a high price differential between center and region even after a regional source of

[23] Assuming producers are properly located.

[24] P. 236. [25] P. 237. [26] P. 241.

supply has come into existence . . . under the basing-point system the regional fabricator has to pay transportation cost even when none is incurred."[27]

Point (1) in the preceding excerpt rests on the proposition that plant location under the system is irrational. The point is one that has already been discussed. Essentially the same reasoning is involved as in the previous example of mills A and D and the 18 consuming centers. The introduction of a far-away non-base mill does not essentially change the conclusion. Point (2), of course, implies "phantom freight" advantage for non-base mills, and irrational practice by distant sellers. It is not material that the distant mill is a non-base mill. The distant mill can become a base rather than a non-base mill without changing its economic situation in the slightest by simply announcing a base price which is higher than that of the nearest base by the freight rate from the closest basing point. Moreover, the distant mill can exert any economic advantage it possesses by lowering this base price under the system. It hardly seems reasonable to assume that the elimination of the system would entail foregoing any advantage that exists. And if the advantage does exist it can be exerted under the system. Certainly, f.o.b. pricing does not require the same price at all points of production, any more than a basing-point system requires uniform base prices.

If we suppose logical and rational behavior on the part of basing-point participants, it follows that mal-location of both producers and consumers is limited to delay occasioned by the lack of corrective pressure resulting from the lack of competition, and can not be regarded as a consequence uniquely attributable to a basing-point system. Significant departures from rational behavior are of course possible on the part of participants in basing-point systems, or for that matter, other systems. But to confine economic analysis to speculation concerning irrational motives is to rob it of its merit and to deny its very meaning.

Interestingly enough, if a rational model of basing-point behavior could be assumed, Machlup's conclusion concerning relief in the form of compulsory f.o.b. pricing seems to be strengthened rather than weakened. The author's chief doubt about the advisability of this pricing form is that he believes it might entail substantial industrial relocation.

Is Professor Machlup's remedy actually better than he thinks? This question poses complicated problems that cannot be dealt with thoroughly here. The question goes beyond the use of basing-point pricing as a system. The system depends upon cooperative action by competitors. The requirement of mandatory f.o.b. pricing means more than eliminating a cooperative system. It must also be thought necessary to guard against sporadic, non-systematic, non-collusive price discrimination including prices to meet an equally low price of a competitor. (This would in effect eliminate the qualifying clause in Section 2(b) of the Clayton Act as amended by the Robinson-Patman Act.)[28] Those who oppose compulsory f.o.b. pricing contend that the elimination of the basing-point system does not automatically make for enough sellers to achieve the kind of competition in which uniform mill net pricing is automatic.

When the number of sellers is limited, tacit price agreement is simplified. Because price discrimination is a principal vehicle for breaking fixed prices and forcing price competition it is urged that compulsory f.o.b. pricing may make for less rather than

[27] P. 242.

[28] 49 Stat. 1526 (1936), 15 U.S.C.A. § 13 (1941).

more competition.[29] On the other hand, as Professor Machlup stresses, there is the danger that price discrimination can lead to systematic dumping for the purpose of eliminating competitors. Discrimination, for such a purpose, however, is at present in violation of anti-trust law. Presumably Professor Machlup, unlike Professor J. M. Clark,[30] feels that the practical difficulty of establishing "purpose" is so great as to require administrative ruling of what must be done rather than the usual anti-trust method of only attempting to set out what can *not* be done.

Irrespective of the merits of compulsory f.o.b. pricing there seems to be legal and economic concurrence that basing-point systems should be outlawed. There can be no *system* of basing points meeting current standards of anti-trust law so long as it is held that "[i]t is enough to warrant a finding of a 'combination' within the meaning of the Sherman Act, if there is evidence that persons with knowledge that concerted action was contemplated and invited, give adherence to and then participate in a scheme."[31] Consequently, regardless what the verdict turns out to be about the rationality of the system, the cross-hauling of freight, the economics of location, or the oppression of the small by the large, advocates of systematic formula pricing are not likely to receive comfort from current economic analysis of the subject.

WARD S. BOWMAN*

Labor Law: Cases, Materials and Comments. By Charles O. Gregory and Harold A. Katz. Charlottsville: Michie Casebook Corp., 1948. Pp. xxi, 1324. $9.50.

Unusual thought, discussion, and other energy have been devoted since the war to the content of law school courses in labor relations. The old content is widely deemed unsatisfactory for a number of reasons. Except for its concern with the National Labor Relations Act, it concentrates almost wholly on labor war, that is, the use of economic weapons—strikes, boycotts, picketing, and the like. And even the major portion of its concern with the National Labor Relations Act is directed to labor war, the unfair labor practices designed to discourage unionization. Practically no attention is paid to the relations of employees and unions for the greater periods of time in which they bargain collectively and adjust their differences without resort to the economic weapons. The materials, almost wholly judicial opinions, have not adequately expounded the real problems involved in the cases, nor the wider economic and social problems of which the cases are symptomatic; nor have the materials explored the possible methods of solution.[1]

While this casebook by Gregory and Katz is on the whole the best of the Labor Law

[29] A recent article by J. M. Clark, Law and Economics of Basing-Points, 39 Am. Econ. Rev. 430 (1949), develops this position at length.

[30] Ibid.

[31] Federal Trade Commission v. Cement Institute, et al., 333 U.S. 683 (1948).

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[1] The dissatisfaction was stated most effectively by Professor Wirtz in an address which led to the 1947 Conference on Training of Law Students in Labor Relations. Wirtz, On Teaching Labor Law, 42 Ill. L. Rev. 1 (1947). I do not mean to detract from the quality or the truth of his criticism by suggesting that Wirtz's talents would produce similar criticism of a goodly number of other courses in the law school curriculum.

casebooks now in print, it is not a product of or response to this dissatisfaction. Rather, it is a superb execution of the old idea. Of the 1280 pages of materials, 480 deal with strikes, boycotts, injunctions, and restraint of trade; 520 deal with the National Labor Relations Act as amended (more than 300 being devoted to employer unfair labor practices); 70 pages are given to "the internal affairs of labor organizations"; 45 pages deal with the judicial enforceability of collective agreements; and about 160 pages at the end of the volume are devoted to "collective bargaining": its "nature," its "basic problems and trends," some of its "practical aspects," enforcement of collective agreements by arbitration and the settlement of "collective bargaining disputes." Articles from "nonlegal" sources constitute most of the material in these 160 pages.

The authors chose their structure deliberately—almost defiantly—with full knowledge of the advance criticism. While agreeing "naturally ... with the growing sentiment that the big problem in contemporary labor relations policy and law is to devise methods for getting employers and unions together on a peaceful and smooth working basis," they built their book on the "conviction that the fundamental issue in labor relations law always has been, certainly still is, and probably shall continue to be, the extent to which workers may [legally] unite and exert collective economic force against employers in order to secure by self-help those advantages which they have always believed they would not otherwise gain." They have chosen in general "to follow a chronological pattern" in order that "law students should study labor relations law somewhat as a panorama ... an unfolding and ever developing political adaptation of an increasingly industrialized society to our working population's conceptions of their needs which are created by such industrialization," and in order that, by thorough acquaintance "with the past labor relations law," the student "may have some perspective on what it has become today and may develop into in the future under constantly shifting balances of political power." The organization of the materials was influenced also by the "practical" notions that "the lawyer is customarily a legal adviser, not a director of labor relations or a union organizer"; that "sound industrial relations will more readily be achieved if lawyers recognize their essentially professional role in the collective bargaining process and leave the more fundamental decisions of policy to be made by the parties themselves"; and that "the proper components of industrial peace," that is, "the personalities and everyday experiences of management representatives and union officials, with their incidental practical understanding of the interplay of the social and economic forces involved in collective bargaining ... are things which law students cannot very well acquire in schools."[2]

This is not the bliss of ignorance or the narrow legalist's plea for professional blinders. Professor Gregory has had wide experience with labor problems and with collective bargaining in their peaceful adjustment. He has been an active participant in the efforts of the University of Chicago Law School to integrate the social sciences and teach law in its social context. The materials and the numerous editorial comments in the casebook show that the author's own interest, insight, and knowledge are catholic and are not contained by assumed boundaries of a "professional role."

The actual facts of time and space (for example, forty-five hours or a single volume of x pages) do, of course, require choice of materials and emphasis. Much of the con-

[2] The quotations are from the Preface, pp. iii–iv.

troversy as to the choice and its feared evil consequences could be avoided by expanding the limits of time and space. But the choice, when made, must be influenced by the desire to promote deeper knowledge and understanding rather than by notions of what will do for a limited professional role. Law students do not study labor law in preparation for any particular role. And there are no specified roles for lawyers in respect to labor relations. Some lawyers may never strike a labor problem at all; others may be called upon occasionally for very limited advice; still others may be called in solely to prosecute or defend a litigation; and others yet may in fact, if not also in name, be charged with the responsibility of a director of labor relations or union leader. This is quite apart from the lawyer's influence as a citizen, an arbitrator, a politician, a government officer, or an officer or director of a business enterprise. The lawyer's skill is not single. He is not called upon merely to expound or predict the law. He can have other skills generally expected from him—as advocate, negotiator, peacemaker, analyst, or general counsellor. To a large extent, the lawyer's role is shaped by his capacity. Even his legal advice is likely to be wiser and sounder the more he understands the context in which the legal questions are raised. This must be especially true of a branch of the law having the characteristics described in the authors' preface as quoted above.

I like the authors' insistence upon providing materials which adequately show the development of labor law over the years. I like their insistence upon a "chronological" development; indeed, I wish they had followed it more rigidly than they have and had treated the cases together, with only temporal divisions, whether they involved picketing, inducement of breach of contract, boycott, or restraint of trade. Familiarity with historic development seems to me to be a sine qua non in this field. But this objective can be achieved without the voluminous detail which the authors have provided. Their own many editorial comments show how this can be done. But they obviously enjoyed such fun in their sharp analysis and demolition of the judicial opinions that they piled them up enthusiastically and with little restraint. That takes much space in the volume. But, particularly because of the authors' running comments, it need not take much classroom time. Gobs of the material can be assigned as required collateral reading without specific class discussion.

The volume shows long labor and great care in its preparation. It exudes the authors' lively enthusiasms and teaches itself. It is an excellent book for one course. And it calls loudly for another course. For, whatever one may think of the authors' conviction as to "the fundamental issue in labor relations law," there are other issues and other areas for exploration.

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BOOKS RECEIVED

Americans Betrayed. By Morton Grodzins. Chicago: The University of Chicago Press, 1949. Pp. xvii, 445. $5.00.

Antitrust Laws, et al. v. Unit Operation of Oil or Gas Pools. By Robert E. Hardwicke. New York: American Institute of Mining and Metallurgical Engineers, 1948. Pp. ix, 300. $1.50.

Bibliography of Thomas Reed Powell. Cambridge: Harvard University Press, 1949. Pp. 41.

Case of General Yamashita, The. By A. Frank Reel. Chicago: The University of Chicago Press, 1949. Pp. vi, 324. $4.00.

Cases and Materials on Law and Accounting. By Donald Schapiro and Ralph Wienshienk. Brooklyn: The Foundation Press, 1949. Pp. xxi, 935. $8.00.

Cases and Readings on Criminal Law and Procedure. By Jerome Hall. Indianapolis: The Bobbs-Merrill Co., 1949. Pp. xiv, 996.

Cases on Contracts. By Edwin W. Patterson and George W. Goble. Brooklyn: The Foundation Press, 1949. Pp. xii, 1132.

Cases on Contracts. By Samuel Williston. Boston: Little, Brown & Co., 1949. Pp. xx, 823.

Commercial Law, Cases and Materials. By Hugh W. Babb and Carl B. Everberg. Brooklyn: The Foundation Press, 1949. Pp. xliii, 963. $6.00.

Estate Planning. By Joseph Trachtman. Practising Law Institute, 1949. Pp. 170. $2.00.

Jews in Medieval Germany, The. By Guido Kisch. Chicago: The University of Chicago Press, 1949. Pp. xv, 655. $10.00.

Labor Relations and Federal Law. By Donald H. Wollett. Seattle: The University of Washington Press, 1949. Pp. xxv, 148. $3.00.

Language of Politics. By Harold D. Lasswell, Nathan Leites and Associates. New York: George W. Stewart, 1949. Pp. vii, 398. $5.75.

Law Reports of Trials of War Criminals, Vols. XIII–XV. London: His Majesty's Stationery Office, 1949. 5s. od. net (each vol.).

Lessons on Security and Disarmament from the History of the League of Nations. By James T. Shotwell and M. Salvin. New York: Columbia University Press, 1949. Pp. 149. $2.25.

Man in the Primitive World. By E. Adamson Hoebel. New York: McGraw-Hill, 1949. Pp. xii, 543. $5.00.

National Economic Policy for 1949, A. Washington: Robert R. Nathan Associates, Inc., 1949. Pp. 52. $1.00.

Natural Law Institute Proceedings, University of Notre Dame, Vol. I. Edited by Alfred L. Scanlan. Notre Dame: College of Law, University of Notre Dame, 1949. Pp. 142.

Private International Trade Regulatory Arrangements and the Antitrust Laws. By Adolph C. Hugin. Washington, D.C.: Catholic University of America Press, 1949. Pp. xv, 270. $3.75.

Readings in American Legal History. Edited by Mark DeWolfe Howe. Cambridge: Harvard University Press, 1949. Pp. x, 529. $7.50.

Reports of International Arbitral Awards, Vol. II. United Nations. New York: Columbia University Press, 1949. Pp. 617–1369. $7.00.

Revenue Act of 1948, Legislative History Series, The. Edited by Paul A. Wolkin and Marcus Manoff. New York: Matthew Bender & Co., 1949. Pp. xxiii, 667. $10.00.

Separation of Church and State in the United States. By Alvin W. Johnson and Frank H. Yost. Minneapolis: The University of Minnesota Press, 1949. Pp. 279. $4.50.

Short History of OPA, A. By Harvey C. Mansfield. Washington, D.C.: U.S. Government Printing Office, 1949. Pp. v, 332. $0.55.

Show of Violence, The. By Fredric Wertham, M.D. Garden City: Doubleday & Co., 1949. Pp. 279. $3.00.

Tax and Expenditure Policy for 1949. By the Research and Policy Committee of the Committee for Economic Development. New York: Committee for Economic Development. Pp. 45. $0.35.

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